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Supreme Court, U.S.
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Supreme Court of the United States

ARTIN H. COLOIAN,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner, Artin H. Coloian, an attorney and the former Chief of Staff to the Mayor of Providence, Rhode Island, was indicted on bribery charges as part of an infamous and politically-charged prosecution of the Mayor. The lead prosecutor was sanctioned, suspended from the case and fined for certain conduct during the proceedings, and Mr. Coloian received relief short of dismissal of the indictment for an alleged due process violation during the proceedings. After he was acquitted of all charges, Mr. Coloian sought to have the judicial records of his indictment expunged in light of the egregious circumstances of the proceedings against him and the continuing harm that those records have caused to his reputation and law practice. The district court determined that it had jurisdiction over Mr. Coloian's motion, but denied relief. The First Circuit refused to address the merits of Mr. Coloian's appeal and instead held, based on its interpretation of this Court's decision in *Kokkonen v. Guardian Life Insurance Co. of America*, 511 U.S. 375 (1994), that the district court lacked jurisdiction to consider Mr. Coloian's motion. In doing so, the court of appeals joined a now 5-4 split in the circuits over whether a federal court has jurisdiction to expunge judicial criminal records on the basis of its inherent power over its own records.

The question presented is thus:

> Whether a federal district court has inherent or ancillary jurisdiction to expunge judicial criminal records based on equitable considerations.

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PETITION FOR A WRIT OF CERTIORARI

Artin Coloian respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The district court's order was issued orally from the bench on February 10, 2006, and a transcript of that proceeding is reprinted at Pet. App. 25a-36a. The opinion of the United States Court of Appeals for the First Circuit issued on March 20, 2007, is reported as *United States v. Coloian*, 480 F.3d 47 (1st Cir. 2007), and is reprinted at Pet. App. 1a-9a.

JURISDICTION

The judgment of the First Circuit was entered on March 20, 2007. On June 7, 2007, Justice Souter extended the time for filing this petition to and including July 18, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A significant number of former criminal defendants move in the federal courts to have judicial records of their indictments or convictions expunged for equitable reasons related to their underlying criminal proceedings, the context of the actions that gave rise to those proceedings, the effects that those records have on their livelihood, or actions that they have taken since those proceedings were commenced.[1] The federal courts of appeals have traditionally held that, while such relief should be granted only in extraordinary

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[1] There are very limited federal statutory grounds for expunging criminal records that are not at issue in this case. *See, e.g.*, 10 U.S.C. § 1565(e) (mandating expungement of DNA records when military conviction is overturned); 18 U.S.C. § 3607(c) (allowing for expungement of criminal records in certain drug possession cases); 42 U.S.C. § 14132(d) (allowing for expungement of DNA records held by the FBI in certain cases where conviction is overturned).

cases, the federal courts have jurisdiction to consider equitable claims for expungement of judicial records. *See, e.g., Menard v. Saxbe*, 498 F.2d 1017, 1023 (D.C. Cir. 1974).

In *Kokkonen v. Guardian Life Insurance Co. of America*, 511 U.S. 375 (1994), this Court held that a federal court lacks jurisdiction to enforce a settlement agreement where its accompanying order of dismissal did not reserve jurisdiction. In light of *Kokkonen*, several federal circuits have held that a federal court also lacks jurisdiction to consider claims seeking expungement of judicial criminal records based on equitable grounds. Notwithstanding the unusual and troubling circumstances of Mr. Coloian's prosecution and acquittal, the First Circuit below refused to consider the merits of Mr. Coloian's claims and joined with the Third, Eighth and Ninth Circuits to hold that *Kokkonen* compels the conclusion that the federal courts lack jurisdiction to consider claims for expungement of judicial criminal records based on equitable grounds. Thus, there is now a 5-4 split in the federal courts of appeals, with the Second, Fourth, Seventh, Tenth and D.C. Circuits holding that such jurisdiction exists, while the First, Third Eighth, and Ninth Circuits holding that it does not. This conflict is particularly troubling since it concerns the jurisdiction of the federal courts and because the general scope of ancillary jurisdiction in criminal cases has not been defined by this Court.

A. Background

Operation Plunder Dome was a federal investigation into allegations of corruption in the administration of the former Mayor of Providence, Rhode Island, Vincent "Buddy" Cianci, Jr. *See, e.g.*, Brian Carovillano, *After three years of hype, Plunder Dome trial heads to court this week*, THE STANDARD TIMES, Apr. 15, 2002, at A13, *available at* http://archive.southcoasttoday.com/daily/04-02/04-15-02/a13sr065.htm. The investigation led to several indictments and the resulting court cases involved a "crush of pretrial publicity." *Id.* In February 2000, Providence Tax

Board Vice Chairman David C. Ead pleaded guilty to arranging bribes with city officials. *See id.*

Mr. Coloian is an attorney and the former Chief of Staff for Mayor Cianci. (Pet. App. 12a). On April 2, 2001, a federal grand jury in the District of Rhode Island returned a superseding, twenty-nine count indictment charging six individuals, including Mr. Coloian, with various public corruption offenses. (Pet. App. 1a, 11a). Mr. Coloian was charged in only two counts of the indictment: bribery and conspiracy to commit bribery, under 18 U.S.C. § 666(a)(1)(B) and 18 U.S.C. § 371. (Pet. App. 12a). The charges were based on allegations that Mr. Coloian took part in an incident in which Mayor Cianci was allegedly paid $5,000 for obtaining a job for Christopher Ise. (Pet. App. 2a, 12a). Those allegations, in turn, were based solely on the uncorroborated statements of Mr. Ead—an admitted felon—in return for which Mr. Ead had been promised leniency by the prosecution. (Pet. App. 12a & n.1).

Mr. Coloian moved to sever his case from the other defendants named in the indictment on the grounds that a joint trial with the other defendants as to all 29 counts of the indictment would effectively deny him due process of law. (Pet. App. 28a, 30a). In granting Mr. Coloian's motion to sever, the district court noted the risk that the evidence presented against the other defendants would prejudice Mr. Coloian and also that Mr. Coloian appeared to be the least culpable of all of the defendants. (Pet. App. 28a, 30a, 65a).

B. Mr. Coloian's Acquittal

The Government's prosecution involved a number of irregularities. For instance, during the grand jury proceedings, a juror complained that the Government was not cooperating with the grand jury and was withholding material information. (Pet. App. 13a, 18a, 64a). Furthermore, the Government's lead prosecutor was fined and suspended from the case when he showed an evidentiary

video in the case to guests at his house during a party. (Pet. App. 65a).

At trial, the Government's principal evidence against Mr. Coloian was the uncorroborated testimony of Mr. Ead, who had reached a plea bargain with the Government and had been promised leniency for his cooperation. (Pet. App. 12a, 13a). After the testimony of Mr. Ead was read back to the jury, the jury returned a verdict with respect to Mr. Coloian of not guilty on both charges in June 2002. (Pet. App. 18a, 43a). Mr. Coloian was subsequently acquitted of both of the charges brought against him. (Pet. App. 43a).

C. Mr. Coloian's Motion to Expunge

In December 2005, Mr. Coloian filed a motion in the U.S. District Court for the District of Rhode Island, under the same docket number as the criminal case against him, to seal and expunge the judicial records of the charges against him. (Pet. App. 59a-61a). Mr. Coloian acknowledged that expungement is "not routinely granted," but asserted that the remedy was warranted in this case on equitable grounds as a result of the unusual circumstances of his indictment and prosecution, the pronounced stigma that the charges had created against him, and because his arrest and the charges brought against him have impeded and will continue to impede his ability to practice law and transact business. (Pet. App. 60a). Mr. Coloian asserted that the charges brought against him have been particularly harmful to his credibility as a practicing attorney because they alleged a crime of dishonesty. (Pet. App. 60a-61a).

The Government submitted a consolidated opposition to Mr. Coloian's motion to seal and expunge. It argued that, under its interpretation of this Court's decision in *Kokkonen v. Guardian Life Insurance Co.*, 511 U.S. 375 (1994), a federal district court does not have the jurisdiction to consider a motion for expungement. (Pet. App. 68a-69a). The Government acknowledged, however, that the circuits were split on this jurisdictional issue, with several federal

appellate courts ruling that a district court has the jurisdiction to entertain a motion to expunge records and may exercise it in "extraordinary circumstances," and other federal appellate courts holding that, unless there is a showing that the underlying criminal proceedings were unlawful or invalid, a district court does not have the jurisdiction to hear motions to expunge judicial criminal records. (Pet. App. 69a-72a).

The district court ruled on Mr. Coloian's motions from the bench. The court concluded that "courts do have the inherent authority and control over their own records and can, in appropriate circumstances, expunge records, but that power should be sparingly exercised." (Pet. App. 3a, 32a-33a). The court ruled, however, that Mr. Coloian had not demonstrated "extreme hardship" to warrant expungement of the court's records of his criminal case. (Pet. App. 33a).

D. The Decision Below

Mr. Coloian appealed from the district court's order, urging that the district court had applied an erroneous and unduly restrictive legal standard to the merits of Mr. Coloian's expungement motion. (Pet. App. 16a-21a). On appeal, the Government again focused its argument on the issue of whether the district court had jurisdiction to rule on Coloian's motion for expungement. (Pet. App. 47a-54a). Once again, the Government acknowledged the circuit split on this issue. (Pet. App. 48a-50a).

The United States Court of Appeals for the First Circuit vacated the district court's order. The court of appeals held that a federal court does not have jurisdiction over a motion to expunge brought on equitable grounds. (Pet. App. 9a). In so holding, the court acknowledged, (Pet. App. 4a-5a), that it had previously addressed the issue of a court's jurisdiction over a motion to expunge in *Reyes v. Supervisor of DEA*, 834 F.2d 1093 (1st Cir. 1987), where the First Circuit had stated that a court's jurisdiction to "exercise its equitable discretion to expunge . . . files" is a "narrow" power. *Id.* at 1098.

The court also acknowledged a circuit split, recognizing that the Second, Seventh, Tenth, and D.C. Circuits had concluded that district courts have jurisdiction to expunge records based on equitable considerations, and that the Third, Eighth, and Ninth Circuits had interpreted this Court's decision in *Kokkonen* to preclude the exercise of jurisdiction over such motions to expunge. (*See* Pet. App. 7a-8a). The First Circuit ruled that, under *Kokkonen*, which held that a federal court lacks ancillary jurisdiction to enforce a settlement agreement where its accompanying order of dismissal did not reserve jurisdiction, a district court does not have jurisdiction to order expungement on equitable grounds. (Pet. App. 8a-9a). The First Circuit reasoned that *Kokkonen* permits ancillary jurisdiction "only (1) to permit disposition of interrelated claims by a single court and (2) to enable a court to 'manage its proceedings, vindicate its authority, and effectuate its decrees.'" (Pet. App. 8a) (quoting *Kokkonen*, 511 U.S. at 379-80). The First Circuit then determined that a federal court lacks ancillary jurisdiction to expunge judicial criminal records on equitable grounds because such "equitable grounds" have "nothing to do" with the "original claims brought before the district court," and because "the power asked for" is "quite remote from what courts *require* in order to perform their functions." (Pet. App. 9a). The court rejected the reasoning of the cases on the majority side of the circuit conflict on the basis that they either predated *Kokkonen* or failed to address that decision. (*See* Pet. App. 9a).

In light of its ruling that the district court lacked jurisdiction, the First Circuit did not reach the merits of Mr. Coloian's motion to expunge the court's record of his criminal proceeding, did not address Mr. Coloian's argument that the district court had applied an erroneous legal rule to his motion to expunge, and vacated the district court's order with instructions to dismiss Mr. Coloian's motions. (*See* Pet. App. 9a).

REASONS FOR GRANTING THE WRIT

This Court should grant the writ for three reasons.

First, there is now a sharp 5-4 split in the circuits on the question whether a federal court has jurisdiction over motions to expunge judicial criminal records based on equitable grounds, and this Court's intervention is necessary to resolve the split.

Second, the question presented is important and recurring as a significant number of former criminal defendants move to expunge their judicial records, and the confusion in the lower courts over the federal courts' jurisdiction to address such claims for expungement, as well as the contours of the doctrine of ancillary jurisdiction in the criminal law context, will not be resolved without this Court's intervention.

Third, the First Circuit below erroneously ruled that this Court's previous decision in *Kokkonen* compels the conclusion that the federal courts lack jurisdiction to address claims for expungement of judicial criminal records based on equitable grounds. The Court in *Kokkonen* neither addressed nor purported to address the application of the doctrine of ancillary jurisdiction to expungement of criminal records; that decision simply does not resolve the question presented here. In all events, this Court's explanation in *Kokonnen* of the bases for ancillary jurisdiction actually supports federal court jurisdiction over claims for expungement based on equitable grounds. A motion to expunge judicial records of a criminal charge should be deemed "in varying respects and degrees, factually interdependent" with the underlying criminal proceedings themselves. *Kokkonen*, 511 U.S. at 379. And to "function successfully" and "manage its proceedings" a federal court requires the power to mange its own records. *Id.* at 380.

I. THE DECISION BELOW DEEPENS AN ALREADY-MATURE CIRCUIT CONFLICT, CREATING A 5-4 SPLIT

There is now a 5-4 split among the circuits as to whether a federal court has jurisdiction to expunge judicial records of a criminal proceeding based on equitable grounds: The Second, Fourth, Seventh, Tenth, and D.C. circuits have concluded that district courts have ancillary jurisdiction to expunge records based on equitable considerations, while the Third, Eighth, Ninth, and now the First Circuit, have ruled that federal courts lack ancillary jurisdiction over orders to expunge criminal records based solely on equitable grounds. (*See* Pet. App. 7a-8a). To resolve this split, the Court should grant the writ.

A. The federal courts of appeals first began to address jurisdiction to expunge records more than thirty years ago. In *Menard v. Saxbe*, 498 F.2d 1017, 1023 (D.C. Cir. 1974), the D.C. Circuit held that "[t]he judicial remedy of expungement is inherent and is not dependent on express statutory provision . . . . ." Later, in an opinion joined by then-Circuit Judge Bader Ginsburg, the D.C. Circuit again acknowledged that "courts have the inherent, equitable power to expunge arrest records." *Livingston v. Dep't of Justice*, 759 F.2d 74, 78 (D.C. Cir. 1985). The court emphasized that a decision whether to expunge records depends on the facts of each case and requires a balancing of the equities involved. *See id.* at 78.

After canvassing the case law, the Tenth Circuit held in *United States v. Linn*, 513 F.2d 925, 927 (10th Cir. 1975), that "it is fairly well established . . . that courts do possess the power to expunge an arrest record where the arrestee has been acquitted," but that an acquittal alone is not sufficient to exercise this authority" and that it "should be reserved for the unusual or extreme case." *See also United States v. Friesen*, 853 F.2d 816, 817-18 (10th Cir. 1988) ("Our analysis begins with the principle that the district court has

the authority to order expunction . . . . [M]ere acquittal of the subsequent charge is an insufficient reason to grant expunction.").

The Second Circuit joined the majority of the circuits on this issue in *United States v. Schnitzer*, 567 F.2d 536 (2d Cir. 1977), and ruled that district courts have the power to expunge records of an arrest in their equitable discretion, but noted that "relief usually is granted only in extreme circumstances." *Id.* at 539 (internal quotation marks omitted). As in the D.C. Circuit, the Second Circuit's rule is that any request to expunge judicial records must be examined individually and after weighing the "equities," in light of the principle that the power to expunge should be reserved only for unusual cases. *See id.* at 539-40.

The First Circuit below did not mention the Fourth Circuit as among those courts that have recognized a federal court's authority to expunge criminal records. But in *Allen v. Webster*, 742 F.2d 153 (4th Cir. 1984), the Fourth Circuit followed the Second Circuit in acknowledging that district courts have inherent authority to expunge criminal records in "'exceptional circumstances.'" *Id.* at 154-55 (quoting *Schnitzer*, 567 F.2d at 155). The Fourth Circuit ruled in *Webster* that the district court had not abused its discretion in denying the motion for expungement because the movant had failed to demonstrate exceptional circumstances. *Id.*

After expressly framing the issue as a jurisdictional one, the Seventh Circuit upheld the inherent power of a federal district court to manage its own judicial records. *See United States v. Janik*, 10 F.3d 470, 472 (7th Cir. 1993) ("[O]ur 'inherent' power extends to the management of *judicial* business.") (emphasis in original); *see also id.* at 471 ("We must, as an initial matter, satisfy ourselves both of our own jurisdiction and the jurisdiction of the district court."). The court ruled, however, that, in the absence of any applicable statutory authority, federal courts do not have any inherent power to order an agency in the Executive Branch to

expunge its records. *See id.* Most recently, in *United States v. Flowers*, 389 F.3d 737, 739 (7th Cir. 2004), the Seventh Circuit reaffirmed that "district courts do have jurisdiction to expunge records maintained by the judicial branch . . . It is fair to say that our view of the balancing test is like that of other courts which have emphasized that expungement is an extraordinary remedy."

B. On the other hand, the circuits that have held that there is no inherent or ancillary jurisdiction to order expungement of criminal records on equitable grounds have all relied on this Court's decision in *Kokkonen*, 511 U.S. 375. In *Kokkonen*, the Court addressed whether a federal district court had subject-matter jurisdiction to enforce a settlement agreement in a case that the district court had dismissed pursuant to the settlement agreement and Federal Rule of Civil Procedure 41(a)(1)(ii) (providing for dismissal "by filing a stipulation of dismissal signed by all parties"). The Court reasoned that none of its prior cases had permitted ancillary jurisdiction over an action "upon a relationship so tenuous as the breach of an agreement that produced the dismissal of an earlier federal suit." 511 U.S. at 379.

The Court stated that "[g]enerally speaking" there are two "heads" of ancillary jurisdiction:

> Generally speaking, we have asserted ancillary jurisdiction (in the very broad sense in which that term is sometimes used) for two separate, though sometimes related, purposes: (1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent; and (2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees.

Kokkonen, 511 U.S. at 379-80 (citations omitted). The Court went on to rule that neither of these heads supports the assertion of ancillary jurisdiction to enforce the terms of a settlement agreement in a case that had been dismissed, but

established that such jurisdiction would exist if the order of dismissal had language stating that the court "retain[ed] jurisdiction" over the settlement agreement. *See id.* at 381. In doing so, the Court emphasized that, without such a retention clause, "enforcement of the settlement agreement is for state courts, unless there is some independent basis for federal jurisdiction." *Id.* at 382.

C. The Ninth Circuit was the first circuit to rely on *Kokkonen* as support for a ruling that, at least in certain circumstances, a federal district court does not have jurisdiction to order expungement of judicial records of a lawful arrest and conviction. *See United States v. Sumner*, 226 F.3d 1005 (9th Cir. 2000). The Ninth Circuit generally agreed with the Second and D.C. Circuits that "district courts possess ancillary jurisdiction to expunge criminal records." *Id.* at 1014. The court held, however, that when a motion for expungement is made "solely for equitable considerations," such as to reward a defendant's post-conviction conduct or rehabilitation, a district court does not have jurisdiction to entertain it. *Id.* According to the Ninth Circuit, a court's inherent jurisdiction to order expungement of criminal records is "limited to expunging the record of an unlawful arrest or conviction, or to correcting a clerical error." *Id.* The court reasoned that *Kokkonen* permits a court to expunge records "to manage proceedings, vindicate authority, and effectuate decrees," but, according to the Ninth Circuit, expungement of a lawful conviction "solely on equitable grounds" does not serve any of those goals. *Id.* (internal quotation marks omitted).

Relying on *Kokkonen* and the Ninth Circuit's decision in *Sumner*, the Third Circuit has held that a district court does not have jurisdiction to expunge criminal records, even when the criminal proceedings end in an acquittal, unless there is "an allegation that the criminal proceedings were invalid or illegal" or there is an applicable statute that permits expungement. *United States v. Dunegan*, 251 F.3d 477, 480 (3d Cir. 2001).

Similarly, the Eighth Circuit has held that, in light of *Kokkonen*, "ancillary jurisdiction does not extend to expungement of a criminal conviction where the petitioner asserts solely equitable grounds." *United States v. Meyer*, 439 F.3d 855, 862 (8th Cir. 2006). The court reasoned, however, that "[a] district court may have ancillary jurisdiction to expunge criminal records in extraordinary cases to preserve its ability to function successfully by enabling it to correct an injustice caused by an illegal or invalid criminal proceeding." *Id.* at 861-62.

Finally, in this case, the First Circuit held that the district court lacked jurisdiction to rule on Mr. Coloian's request for expungement. Although that request was predicated on irregularities in the criminal proceedings brought against Mr. Coloian and the stigma of the criminal charges of which he was later acquitted, the First Circuit ruled that "the original claims brought before the district court in this case have nothing to do with the equitable grounds on which Coloian seeks the expungement of his criminal record." (Pet. App. 8a-9a). The court concluded that "*Kokkonen* forecloses any ancillary jurisdiction to order expungement based on Coloian's proffered equitable reasons." (Pet. App. 9a).

D. In sum, the rule in five circuits is that federal courts have jurisdiction to rule upon a motion to expunge criminal records based on equitable grounds, but that a court should order expungement only in narrow and extraordinary circumstances. Four circuits, including the First Circuit in this case, have ruled to the contrary that whether a court has jurisdiction to rule on a motion for expungement turns on the reason that the movant seeks the relief. Those circuits hold that a district court does not have jurisdiction to rule on a motion for expungement, even of a court's own judicial records, if the court determines that the bases for the motion are "equitable grounds." This deep circuit split is ripe for the Court to resolve.

II. WHETHER A FEDERAL COURT HAS THE POWER TO EXPUNGE ITS OWN RECORDS IS AN IMPORTANT AND RECURRING JURISDICTIONAL ISSUE

The Court should also grant the writ because the issue presented by the decision below is an important and recurring one. While motions to expunge judicial records are granted only rarely, the issue of a court's power to rule on a motion for expungement is a recurring issue that, because it concerns federal courts' jurisdiction, is inherently an important one.

In the last ten years alone, more than fifty decisions from federal courts have addressed a request to expunge criminal records.[2] With the circuits in conflict on this issue, district

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[2] *See, e.g.*, *United States v. Meyer*, 439 F.3d 855 (8th Cir. 2006); *United States v. Rowlands*, 451 F.3d 173 (3d Cir. 2006); *United States v. Crowell*, 374 F.3d 790 (9th Cir. 2004); *United States v. Flowers*, 389 F.3d 737 (7th Cir. 2004); *United States v. Dunegan*, 251 F.3d 477 (3d Cir. 2001); *United States v. Sumner*, 226 F.3d 1005 (9th Cir. 2000); *Sealed Appellant v. Sealed Appellee*, 130 F.3d 695 (5th Cir. 1997); *Lyp v. United States*, 2007 WL 188689 (E.D.N.Y. 2007); *United States v. Saah*, 2007 WL 734984 (E.D. Mich. 2007); *Jackson v. Quarterman*, 2007 WL 1138645 (N.D. Tex. 2007); *In re TwoBears*, 2007 WL 1232043 (W.D. Tenn. 2007); *United States v. McFarlane*, 2007 WL 1452069 (D. Kan. 2007); *United States v. Daisley*, 2006 WL 3497855 (E.D.N.Y. 2006); *United States v. Rahman*, 2006 WL 2466251 (S.D.N.Y. 2006); *United States v. Lemus-Perez*, 2006 WL 2802011 (S.D.N.Y. 2006); *United States v. Fowler*, 2006 WL 3388405 (D. Colo. 2006); *United States v. Ritman-Defelice*, 2006 WL 2361726 (D. Colo. 2006); *United States v. Whitson*, 2006 WL 2645139 (S.D. Ohio 2006); *United States v. Jones*, 2006 WL 2345017 (S.D. Ohio 2006); *United States v. Peralta*, 2006 WL 1804449 (S.D. Ohio 2006); *United States v. Lynum*, 2006 WL 1804543 (S.D. Ohio 2006); *Lind v. United States*, 2006 WL 2087726 (E.D. Mich. 2006); *United States v. Vertel*, 2006 WL 250672 (W.D. Mich. 2006); *United States v. Davis*, 2006 WL 1409761 (D.D.C. 2006); *Holmes v. United States*, 2005 WL 1320149 (E.D.N.Y. 2005); *Payne v. United States Marshal's Office*, 2005 WL 3742789 (N.D. Tex. 2005); *Maul v. Logan County Bd. of County Comm'rs*, 2005 WL 3558057 (W.D. Okla. 2005); *United States v. Doe*, 2004 WL 2071781 (S.D.N.Y. 2004); *Doe v.*

courts throughout the country have thus ruled, and will continue to rule until this Court resolves the split, inconsistently on whether they have jurisdiction to consider (and possibly grant) requests for expungement.

The question presented here is also an important one, and thus particularly well-suited for this Court to review, because it is a jurisdictional issue that concerns the scope of a federal court's power, an aspect of the law where the Court has "prime responsibility." *See* ROBERT L. STERN, ET AL., SUPREME COURT PRACTICE § 4.15, at 252 (8th ed. 2002) ("On the Supreme Court rests the prime responsibility for the proper functioning of the federal judiciary. The grant of certiorari in cases involving federal jurisdiction, practice, and

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Immigration & Customs Enforcement, 2004 WL 1469464 (S.D.N.Y. 2004); *United States v. Doe*, 2004 WL 1124687 (S.D.N.Y. 2004); *United States v. Carson*, 366 F. Supp. 2d 1151 (M.D. Fla. 2004); *United States v. Lau*, 2003 WL 22698810 (S.D.N.Y. 2003); *United States v. James*, 2003 WL 21056989 (E.D.N.Y. 2003); *United States v. Hasan*, 2002 WL 31946712 (E.D.N.Y. 2002); *United States v. Gary*, 206 F. Supp. 2d 741 (D. Md. 2002); *Smith v. United States Parole Comm'n*, 2002 WL 32841640 (D. Md.), *aff'd*, 48 F. App'x 463 (4th Cir. 2002); *United States v. Steelwright*, 179 F. Supp.2d 567 (D. Md. 2002); *United States v. Flagg*, 178 F. Supp.2d 903 (S.D. Ohio 2001); *Schaeuble v. Reno*, 87 F. Supp. 2d 383 (D.N.J. 2000); *Humbles v. District of Columbia*, 2000 WL 246578 (D.D.C. 2000); *United States v. Mcfadzean*, 1999 WL 993641 (S.D.N.Y. 1999); *United States v. Seibel*, 1999 WL 681276 (S.D.N.Y. 1999); *United States v. Morelli*, 1999 WL 459784 (S.D.N.Y. 1999); *United States v. Eustache*, 1999 WL 292707 (S.D.N.Y. 1999); *United States v. Ortiz*, 1999 WL 92281 (S.D.N.Y. 1999); *United States v. Doe*, 36 F. Supp. 2d 143 (S.D.N.Y. 1999); *Cupeta v. United States*, 1999 WL 754281 (E.D.N.Y. 1999); *Akwurah v. United States*, 1999 WL 390832 (E.D.N.Y. 1999); *United States v. Vasquez*, 74 F. Supp. 2d 964 (S.D. Cal. 1999); *United States v. Wiley*, 89 F. Supp. 2d 909 (S.D. Ohio 1999); *United States v. Payne*, 1998 WL 426135 (D. Or. 1998); *United States v. Fletcher*, 1997 WL 557394 (D. Kan. 1997); *Doe v. United States*, 964 F. Supp. 1429 (S.D. Cal. 1997); *United States v. Fields*, 955 F. Supp. 284 (S.D.N.Y. 1997).

procedure reflects that responsibility."); *see also, e.g.*, *Cunningham v. Hamilton County*, 527 U.S. 198, 210 (1999) (Kennedy, J., concurring) ("This case comes to our argument docket, of course, so that we may resolve a split of authority in the Circuits on a jurisdictional issue, not because there is any division of opinion over the [underlying merits issue]."). Indeed, despite the reliance placed by certain of the courts of appeals on this Court's decision in *Kokkonen*, that case did not address a district court's jurisdiction over its own records, in general, or a request for expungement, in particular. As a result, the lower courts have only the decisions of the sharply divided federal courts of appeals to rely upon in determining whether they have jurisdiction to adjudicate a request to expunge judicial records of criminal proceedings. The Court should grant the petition and resolve this issue to provide needed guidance to district courts and the courts of appeals on this threshold issue.

In addition, granting the petition in this case would provide the Court an opportunity to further clarify the boundaries of the doctrine of ancillary jurisdiction, which has remained an unsettled area of the law. This Court's decision in *Kokkonen* applied the doctrine of ancillary jurisdiction in the context of determining whether a federal court may assert jurisdiction over a state law claim for breach of a settlement agreement. Notwithstanding this Court's guidance, however, courts continue to struggle with issues of the proper application of ancillary jurisdiction. Ten years after *Kokkonen*, the courts of appeals still characterize the doctrine as "not easily defined" and "not well settled." *Stein v. KPMG, LLP*, 486 F.3d 753, 760 (2d Cir. 2007) ("[T]he proper scope of ancillary jurisdiction is not well-settled by our case law."); *Garcia v. Teitler*, 443 F.3d 202, 208 (2d Cir. 2006) ("The boundaries of ancillary jurisdiction are not easily defined and the cases addressing it are hardly a model of clarity.").

Of particular relevance here, the lower courts have dealt with the issue of whether, since the codification of the

doctrine of supplemental jurisdiction for civil actions under the Judicial Improvement Act of 1990, *see* 28 U.S.C. § 1367(a), federal courts may exercise ancillary jurisdiction at all in connection with a criminal action. *See, e.g.*, *Garcia*, 443 F.3d at 207 (addressing whether courts have ancillary jurisdiction in criminal cases to award attorney's fees). The lower courts have generally held that such jurisdiction does exist, *see, e.g.*, *id.* (relying on criminal records expungement cases as examples), but this Court has never squarely addressed the viability of ancillary jurisdiction in the context of a criminal matter. Resolution of the question presented here would clarify whether the doctrine of ancillary jurisdiction indeed applies in criminal cases.

In short, whether a federal district court has the power to rule on a motion for expungement is an important and recurring issue, which this Court should decide both to clarify the scope of the doctrine of ancillary jurisdiction and in furtherance of this Court's responsibility to resolve fundamental issues concerning the scope of the power of the federal courts.

III. THE FIRST CIRCUIT IMPROPERLY APPLIED THIS COURT'S DECISION IN *KOKKONEN* IN RULING THAT A COURT LACKS JURISDICTION TO EXPUNGE ITS OWN RECORDS

An additional reason to grant the writ is that the decision below, and the other cases in the minority of the circuit split at issue, misapply this Court's decision in *Kokkonen* and the doctrine of ancillary jurisdiction.

A. *Kokkonen* directly addressed whether a federal court or a state court should adjudicate a state law claim arising from an alleged breach of a settlement agreement. The underlying case, which was for breach of a separate agency agreement, had been brought in diversity in federal court and was dismissed after the parties reached a settlement. *See* 511 U.S. at 376. The district court in that case had not, as is

commonly done, retained jurisdiction over the case for purposes of enforcing a settlement agreement. *See id.* at 381. The Court ruled that in these particular circumstances a federal court does not have jurisdiction over a claim under state law for a breach of contract:

> No case of ours asserts, nor do we think the concept of limited federal jurisdiction permits us to assert, ancillary jurisdiction over any agreement that has as part of its consideration the dismissal of a case before a federal court.

Id. at 380. In particular, the Court reasoned that the district court could not properly assert ancillary jurisdiction over the state law breach of contract claim because (i) it was unrelated to the underlying lawsuit for breach of a separate agency agreement; and (ii) a federal court does not have to retain jurisdiction over claims for breach of a settlement agreement to perform its functions. *See id.* at 380 ("[T]he facts underlying respondent's dismissed claim for breach of agency agreement and those underlying its claim for breach of settlement agreement have nothing to do with each other . . . ."); *id.* at 381 ("[A]utomatic jurisdiction over such [settlement] contracts is in no way essential to the conduct of federal-court business.").

Although the Court in *Kokkonen* invoked the doctrine of ancillary jurisdiction to resolve whether a federal court may adjudicate a state law claim for breach of a settlement agreement, it did not purport to make any sweeping determination of *every* circumstance in which a federal court may assert ancillary jurisdiction. Indeed, in describing the doctrine—as developed in the Court's precedents—the Court was careful to note that "[t]he doctrine of ancillary jurisdiction can hardly be criticized for being overly rigid or precise." 511 U.S. at 379.

Importantly, nothing in *Kokkonen* purported to address whether a court may assert ancillary jurisdiction over its own criminal records—an issue that is quite different from

whether, in the absence of diversity jurisdiction, a federal court has the power to adjudicate a state law claim for breach of contract. Unlike the question presented in *Kokkonen*, the question presented here has nothing to do with the proper allocation of jurisdiction between the federal and state courts over matters traditionally resolved in the state courts. There is no state law remedy available that would result in the expungement of a federal court's judicial records, nor does such expungement intrude in any way into the traditional jurisdiction of the state courts. Moreover, the *Kokkonen* decision did not purport to address the contours of ancillary jurisdiction in the context of criminal proceedings.

Accordingly, as a threshold matter, the reliance on *Kokkonen* by the First Circuit below, and by the other courts of appeals that have similarly ruled that federal courts lack ancillary jurisdiction to expunge criminal records on equitable grounds, appears misplaced. *Kokkonen* simply does not resolve the question presented here. Given the substantial history and sound reasoning underlying the uniform pre-*Kokkonen* rule in the courts of appeals that federal courts *do* have jurisdiction to consider expungement claims based on equitable grounds, *see supra* Part I, there is no persuasive justification for holding that *Kokkonen* compels the opposite rule.

B. In all events, contrary to the reasoning of the First Circuit below, the exercise of jurisdiction over a motion for expungement of judicial records of criminal proceedings based on equitable grounds fits under both of the "heads" of ancillary jurisdiction that the Court identified in *Kokkonen*.

First, a motion to expunge judicial records of a criminal proceeding is "in varying respects and degrees, factually interdependent" with the underlying criminal proceeding in federal court. *Kokkonen*, 511 U.S. at 379. The decision below stated, in conclusory terms, that "the original claims brought before the district court in this case have nothing to do with the equitable grounds on which Coloian seeks the

expungement of his criminal record." (Pet. App. 8a-9a). But in this case Mr. Coloian asserts that the stigma of having been charged with bribery, even though he was acquitted, is impeding his ability to practice law and his career in politics and has damaged his reputation; moreover, Mr. Coloian has also asserted that expungement is justified in part because of irregularities in the conduct of the prosecution itself. (Pet. App. 59a-61a, 64a-65a).

Mr. Coloian's claim, which is exemplary of those raised in motions for expungement based on the effects of having been charged with a federal crime, is plainly "interdependent" with the underlying criminal charge. Indeed, it is *because* of that charge that Mr. Coloian is seeking to expunge the court's records of the criminal proceedings. As the district court's order illustrates, ruling on a motion for expungement on such a ground necessarily entails an inquiry into the underlying criminal charges, their disposition, and the effect of those charges on the movant—all of which are "factually interdependent" with the underlying criminal proceeding. (*See* Pet. App. 28a) (asking whether "the fact that he was acquitted . . . remove[s] much of the sting here"); (Pet. App. 28a) (counsel's argument that "this is an unusual and extreme case," due to the unusual events during trial, including the sanctioning of the lead prosecutor and the high profile nature of the prosecution); (Pet. App. 34a) (court reasoning expungement is not favored because the record "includes not only the fact that Mr. Coloian was indicted and charged, but that a Jury acquitted him").

A motion to expunge records of a criminal proceeding is thus at least as "factually interdependent" with the underlying federal court proceeding as is, for example, a request for attorney's fees. And, both before and after *Kokkonen*, courts have routinely asserted ancillary jurisdiction over requests for attorney's fees arising from the underlying litigation. *See, e.g.*, *Kokkonen*, 511 U.S. at 380 (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), as an

example of an assertion of ancillary jurisdiction over a motion to compel payment of attorney's fees as a sanction); *Stein*, 486 F.3d at 760 ("The most common exercise of ancillary jurisdiction is, probably, to resolve fee disputes between a party and its attorney arising in litigation in which the attorney represented the party.").

Second, under the other "head" of jurisdiction set forth in *Kokkonen*, a court should have ancillary jurisdiction over its own records to "enable [it] to function successfully" and "manage its proceedings." *Kokkonen*, 511 U.S. at 380. It cannot be seriously questioned, that, at least in some contexts, a federal court requires control over its own records if it is to function successfully as a court. Surely, for example, a federal court can dispose of records held under seal, even after a case has concluded or been dismissed. *See Gamble v. Deutsche Bank AG*, 377 F.3d 133, 141 (2d Cir. 2004) ("[A] protective order, like any ongoing injunction, is always subject to the inherent power of the district court to relax or terminate the order, even after judgment.") (internal quotation marks omitted); *see generally Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978) ("Every court has supervisory power over its own records and files . . . ."). Indeed, several of the courts of appeals that have held that federal courts do not have jurisdiction to expunge records on equitable grounds have acknowledged that courts may correct clerical errors in records long after a case has been resolved or can expunge records in cases where there is a constitutional violation. *See, e.g.*, *Sumner*, 226 F.3d at 1014 (court's "ancillary jurisdiction is limited to expunging the record of an unlawful arrest or conviction, or to correcting a clerical error"); *Dunegan*, 251 F.3d at 480 (court has jurisdiction to expunge criminal records where there is "an allegation that the criminal proceedings were invalid or illegal"); *Meyer*, 439 F.3d at 861 (same).

But the specific contours of how a court, in its discretion, should exercise its power over its own judicial records should not determine the threshold issue of whether a court

has *jurisdiction* over those records. The approach taken by the courts in the minority of the split at issue here, including the First Circuit, conflates the jurisdictional and merits inquiries. The jurisdictional inquiry, as framed in the *Kokkonen* decision, is whether a court requires control over its own documents to function successfully and manage its proceedings. *See* 511 U.S. at 379-80. The answer to that question is obviously "yes," and the courts in the minority have not seriously contended otherwise. Whether and when to expunge records on equitable grounds, remedy constitutional or statutory violations, or correct clerical errors is not a jurisdictional question, but rather a question of how a court's underlying authority should be exercised.

C. Finally, it should be noted that recognizing a court's *jurisdiction* to entertain a motion for expungement based on equitable grounds does not mean that such motions would become commonplace or that they would be frequently granted. As the courts of appeals have noted, expungement is not commonly granted—in those circuits that recognize federal courts' jurisdiction to rule on expungement motions based on equitable grounds—even for acquitted defendants. *See, e.g.*, *Flowers*, 389 F.3d at 739 ("[O]ur view of the balancing test is like that of other courts which have emphasized that expungement is an extraordinary remedy. . . . '[U]nwarranted adverse consequences' must be uniquely significant in order to outweigh the strong public interest in maintaining accurate and undoctored records."). There is thus no reason to believe that acknowledging the federal courts' jurisdiction to rule on a motion for expungement would make such motions routine or mean that they would be commonly granted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

UNITED STATES of America, Appellee,

v.

Artin H. COLOIAN, Defendant, Appellant.

No. 06-1357.

Decided March 20, 2007.
Heard Dec. 5, 2006.

Before **Torruella**, Circuit Judge, **Cyr**, Senior Circuit Judge, and **Howard**, Circuit Judge.

Torruella, Circuit Judge.

On April 2, 2001, defendant-appellant Artin H. Coloian was indicted on charges of bribery and conspiracy to commit bribery. The case went to trial and on June 27, 2002, Coloian was acquitted of both counts. Three years later, Coloian filed a motion to expunge his criminal record on equitable grounds under the original district court case number. The government responded that the district court lacked jurisdiction to consider the motion and that the requested relief was inappropriate in any event. The district court concluded that it did have jurisdiction to expunge records, but that expungement was not warranted in Coloian's case. After careful consideration, we vacate the district court's order and remand for dismissal for want of jurisdiction.

I. *Factual Background*

On April 2, 2001, a federal grand jury returned a superseding indictment charging Coloian, an attorney and former Chief of Staff for the mayor of Providence, among others, with various public corruption offenses. Coloian's case proceeded to trial on two counts: bribery and conspiracy

to commit bribery. Those charges were based on allegations that Coloian had been involved in a scheme whereby Vincent A. Cianci, Jr., then mayor of Providence, was paid $5,000 for obtaining a job for one Christopher Ise. On June 27, 2002, following a four-day trial, a jury acquitted Coloian of both counts.[1]

On December 8, 2005, more than three years later, Coloian filed a Motion to Expunge under the original district court case number in the United States District Court for the District of Rhode Island.[2] In that motion, Coloian asked the court to "expunge his record with all due dispatch." Coloian asserted that expungement was warranted on equitable grounds because the "stigma" of having been charged "is extreme and unusual" and his arrest and trial resulted in impediments to "his ability to practice law and business." Coloian also filed a related motion to seal the records.[3]

The government filed a consolidated response in which it challenged the court's jurisdiction to expunge Coloian's record on equitable grounds and argued that, even if jurisdiction existed, the requested expungement was inappropriate given Coloian's circumstances. In reply, Coloian reasserted his complaints of stigma and made vague allegations of "zealous prosecution" during the course of the grand jury proceedings in his case.

At a February 10, 2006 hearing, Coloian conceded that nothing in the criminal record had "disqualif[ied] him for

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[1] During the trial, the district court denied Coloian's motion for judgment of acquittal.

[2] The word "expunge" generally refers to the physical destruction of information. *Dubnoff v. Goldstein*, 385 F.2d 717, 724 (2d Cir. 1967). With respect to criminal records, expunction refers to the process of sealing or destroying the record of a criminal conviction after expiration of a certain time. *U.S. v. Johnson*, 941 F.2d 1102, 1111 (10th Cir. 1991) (citing *Black's Law Dictionary* at 522 (5th ed.1979)).

[3] Coloian does not appeal the district court's ruling on his motion to seal.

anything that he might apply for in the future," but emphasized that the record appeared on his credit report, and that he was questioned about it by banks, potential clients and friends. Coloian suggested that he was different from other acquitted defendants in that he was a "practicing attorney" and "a member of the business community," and as such, a criminal record was particularly damaging because character and reputation are of particular importance in his chosen career.

In an oral disposition, the district court first concluded that "courts do have inherent authority and inherent control over their records and can, in appropriate circumstances, expunge records, but that power should be very sparingly exercised." The court noted that expungement would be appropriate upon a showing that the proceedings had been unlawful or invalid, or the record of the proceeding caused "extreme hardship" in a particular case. However, the court found that Coloian had not presented "anything even approaching satisfaction of either of those criteria."

On appeal, Coloian contends that the district court acquired and retained subject matter jurisdiction over this case once the indictment was filed against him pursuant to 18 U.S.C. § 3231. He further asserts that the district court has ancillary jurisdiction to adjudicate and determine matters incidental to the exercise of its primary jurisdiction. Coloian contends that because his motion to expunge his criminal record relates to the charges in the indictment and "remain[s] a public record and record of the District Court," the district court has ancillary jurisdiction over the expungement of the criminal records.[4] We disagree.

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[4] Congress has specifically provided for expungement or related remedies in narrowly defined circumstances. *See, e.g.*, 5 U.S.C. §§ 552a(d), (g)(1)(C) (allowing claims to amend public records that are inaccurate); 10 U.S.C. § 1565(e) (mandating expungement of DNA records when military conviction is overturned); 18 U.S.C. § 3607(c) (allowing for expungement

II. *Discussion*

We review the threshold jurisdictional issue *de novo*. *See Baella-Silva v. Hulsey*, 454 F.3d 5, 10 (1st Cir. 2006).

This case presents an issue of first impression in the First Circuit. The only case in this Circuit to have addressed this issue, albeit indirectly, is *Reyes v. Supervisor of the DEA*, 834 F.2d 1093 (1st Cir. 1987). In that case, we held that "the court below did not commit reversible error by refusing to exercise its equitable discretion to expunge Reyes' files. That power is a narrow one, and has been used more often to expunge records of unconstitutional convictions." *Id.* at 1098 (citation omitted). Although this holding assumes that courts are empowered to order expungement based on equitable considerations, the question of the district court's jurisdiction to order the expungement was not squarely before the court. We must now determine whether a district court has ancillary jurisdiction to adjudicate a motion to expunge criminal records based purely on equitable grounds.

A district court has original jurisdiction over "all offenses against the laws of the United States." 18 U.S.C. § 3231. We have held that "[o]nce subject-matter jurisdiction has properly

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of criminal records in certain drug possession cases); 21 U.S.C. § 844a(j) (allowing for expungement of civil penalty records in certain drug possession cases); 42 U.S.C. § 14132(d) (allowing for expungement of DNA records held by the FBI in certain cases where conviction is overturned). Also, federal courts have upheld the expungement of criminal records as a remedy for arrests or prosecutions that violate federal statutes or the constitution. *See, e.g.*, *United States v. McLeod*, 385 F.2d 734, 738-39 (5th Cir. 1967) (directing the expungement of all arrests and prosecutions in the record as a remedy for state's violation of the Civil Rights Act); *Sullivan v. Murphy*, 478 F.2d 938, 960 (D.C. Cir. 1973) (same, as remedy for government's violation of the Constitution). Coloian does not seek expungement under any of these statutes, nor does he seek expungement as a remedy for the violation of his statutory or constitutional rights.

attached, courts may exceed their authority or otherwise err without loss of jurisdiction." *Prou v. United States*, 199 F.3d 37, 45 (1st Cir. 1999). However, by providing for a deadline for notices of appeal from a court's judgment, Rule 4(b) of the Federal Rules of Appellate Procedure "is a jurisdictional limitation upon the powers of the district court after a judgment of conviction has been entered." *United States v. Sumner*, 226 F.3d 1005, 1013 (9th Cir. 2000) (citing 18 U.S.C. § 3562(b); *United States v. Dumont*, 936 F.2d 292, 295 (7th Cir. 1991)). Still, a district court may assert ancillary jurisdiction "to adjudicate claims and proceedings related to a claim that is properly before the court." *Black's Law Dictionary* 868 (8th ed.2004); *see also United States v. Dunegan*, 251 F.3d 477, 478-79 (3d Cir. 2001) ("A federal court invokes ancillary jurisdiction as an incident to a matter where it has acquired jurisdiction of a case in its entirety and, as an incident to the disposition of the primary matter properly before it. It may resolve other related matters which it could not consider were they independently presented.").

In *Kokkonen v. Guardian Life Insurance Co. of America*, the Supreme Court shed some light on the contours of a district court's ancillary jurisdiction. 511 U.S. 375, 114 S.Ct. 1673, 1673, 128 L.Ed.2d 391 (1994). In that case, the Court unanimously held that a district court lacked subject matter jurisdiction to enforce a settlement agreement it had approved where its accompanying order of dismissal did not reserve jurisdiction. *Id.* at 378, 114 S.Ct. 1637. In so holding, the Court began by reiterating that "[f]ederal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." *Id.* at 377, 114 S.Ct. 1673 (citations omitted). The Court went on to state that federal courts' ancillary jurisdiction serves two purposes: "(1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent; and (2) to enable a court to function successfully, that is, to manage its proceedings,

vindicate its authority, and effectuate its decrees." *Id.* at 379-80, 114 S.Ct. 1673 (citations omitted).

The Court first noted that the claim originally before the district court-the claim it dismissed-had nothing to do with the claim for breach of the settlement agreement; "it would neither be necessary nor even particularly efficient that they be adjudicated together." *Id.* at 380, 114 S.Ct. 1673. As such, the district court's assertion of jurisdiction could not be said to serve the first purpose of ancillary jurisdiction. *Id.* With respect to the second purpose, the Court stated that the "inherent power" requested in that case-the power to reopen the case to enforce the settlement agreement-was "quite remote from what courts require in order to perform their functions," given that the district court's only order in the underlying case was that the suit be dismissed, "a disposition that is in no way flouted or imperiled by the alleged breach of the settlement agreement."[5] *Id.*

In view of the Supreme Court's instruction on the purposes of ancillary jurisdiction, we must determine whether Coloian's request for the expungement of his criminal record, based solely on equitable grounds,[6] serves either of these purposes.

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[5] Examples of a district court's proper exercise of ancillary jurisdiction "to enable a court to function successfully" include the power to compel payment of sanctions for misconduct, *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991), the power to fine for contempt or imprison for contumacy, *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34, 3 L.Ed. 259 (1812), and the power to appoint an attorney to prosecute defendants for criminal contempt, *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 795, 107 S.Ct. 2124, 95 L.Ed.2d 740 (1987). *See Kokkonen*, 511 U.S. at 380, 114 S.Ct. 1673 (citing also 13 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3523 (1984)).

[6] When we refer to "equitable grounds," we mean grounds that rely only on notions of fairness and are entirely divorced from legal considerations. Other circuit courts have also emphasized this distinction. *See, e.g.*,

The Third, Eighth and Ninth Circuits have read Kokkonen to preclude ancillary jurisdiction over orders to expunge criminal records based solely on equitable grounds. These circuits have rejected the notion that a federal court's jurisdiction under either § 3231 or its "inherent power" provides ancillary jurisdiction over equitable orders to expunge because such orders do not fit within *Kokkonen*'s purposes for ancillary jurisdiction. *See, e.g.*, *Dunegan*, 251 F.3d at 479 (3d Cir. 2001) ("We do not believe that [the ancillary jurisdiction purposes articulated in *Kokkonen* contemplate a petition for the expungement of a criminal record."); *Meyer*, 439 F.3d at 859-60 (8th Cir. 2006) ("In light of the Supreme Court's instruction narrowing the scope of ancillary jurisdiction in [*Kokkonen*], we are convinced that a district court does not have ancillary jurisdiction to expunge a criminal record based solely on equitable grounds."); *Sumner*, 226 F.3d at 1014 (9th Cir. 2000) ("Expungement of a criminal record solely on equitable grounds ... does not serve [the ancillary jurisdiction purposes articulated in *Kokkonen*].").

United States v. Meyer, 439 F.3d 855, 860-62 (8th Cir. 2006) (holding that "a district court does not have subject matter jurisdiction over a motion to expunge that is based solely on equitable considerations," but that it "may have ancillary jurisdiction to [expunge] in extraordinary cases to preserve its ability to function successfully by enabling it to correct an injustice caused by an illegal or invalid criminal proceeding"); *United States v. Dunegan*, 251 F.3d 477, 480 (3d Cir. 2001) (holding that a district court did not have jurisdiction over a motion to expunge criminal records based on equitable grounds, but declining to decide "whether a record may be expunged on the basis of Constitutional or statutory infirmity in the underlying criminal proceedings or on the basis of an unlawful arrest or conviction"); *United States v. Sumner*, 226 F.3d 1005, 1014-15 (9th Cir. 2000) (holding that expungement of a criminal record "solely on equitable grounds, such as to reward a defendant's rehabilitation and commendable post-conviction conduct" did not serve the purposes of ancillary jurisdiction as articulated in *Kokkonen*, and that "a district court's ancillary jurisdiction is limited to expunging the record of an unlawful arrest or conviction, or to correcting a clerical error").

The Second, Seventh, Tenth and D.C. Circuits, however, have concluded that district courts do have ancillary jurisdiction to expunge records based on equitable considerations.[7] *See, e.g.*, *United States v. Flowers*, 389 F.3d 737, 739 (7th Cir. 2004) ("The test for the expungement of judicial records is a balancing test: 'if the dangers of unwarranted adverse consequences to the individual outweigh the public interest in maintenance of the records, then expunction is appropriate.' ") (quoting *United States v. Janik*, 10 F.3d 470, 472 (7th Cir. 1993)); *United States v. Schnitzer*, 567 F.2d 536, 539 (2d Cir. 1977) ("[E]xpungement lies within the equitable discretion of the court, and relief usually is granted only in 'extreme circumstances.'"); *Livingston v. U.S. Dep't of Justice*, 759 F.2d 74, 78 (D.C. Cir. 1985) ("It is well established, and undisputed by the parties to this case, that courts have the inherent, equitable power to expunge arrest records."); *U.S. v. Linn*, 513 F.2d 925, 927 (10th Cir. 1975) ("Certain of the cases call for a 'balancing' of the equities between the Government's need to maintain extensive records in order to aid in general law enforcement and the individual's right to privacy."). However, these cases either predate *Kokkonen* or they fail to address that decision, which raises questions as to their continued viability.

We agree with the Third, Eighth and Ninth Circuits that *Kokkonen* answers the question raised in this case. As the *Kokkonen* court held, ancillary jurisdiction exists only (1) to permit disposition of interrelated claims by a single court and (2) to enable a court to "manage its proceedings, vindicate its authority, and effectuate its decrees." 511 U.S. at 379-80, 114 S.Ct. 1673. As in *Kokkenen*, the original claims brought

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[7] Although the Seventh and Tenth Circuits have not specifically tied the district court's power to expunge criminal records to a particular jurisdictional basis, we interpret the silence to mean that the power is grounded on a district court's ancillary jurisdiction. *Cf. Kokkonen*, 511 U.S. at 380, 114 S.Ct. 1678 (viewing claims of a district court's "inherent power" as falling under ancillary jurisdiction).

before the district court in this case have nothing to do with the equitable grounds upon which Coloian seeks the expungement of his criminal record. Moreover, "the power asked for here is quite remote from what courts *require* in order to perform their functions." *Id.* at 380, 114 S.Ct. 1678 (emphasis added). The existence and availability of Coloian's criminal records do not frustrate or defeat his acquittal. In fact, the records are entirely consistent with and respectful of the jury's ultimate judgment in Coloian's case, as they accurately document his arrest, trial and acquittal. Thus, *Kokkonen* forecloses any ancillary jurisdiction to order expungement based on Coloian's proffered equitable reasons. We therefore find that the district court did not have jurisdiction to consider Coloian's request for the expungement of his criminal record on equitable grounds.

III. *Conclusion*

Because we find that the district court lacked jurisdiction to consider Coloian's motion, we vacate the district court's order and remand for dismissal for want of jurisdiction.

No. 06-1357

UNITED STATED COURT OF APPEALS

FOR THE FIRST CIRCUIT

UNITED STATES

Appellee

v.

ARTIN H. COLOIAN

Defendant – Appellant

On Appeal From a Judgment of the
United States District Court For The
District of Rhode Island
Honorable Ernest C. Torres
Chief District Judge

BRIEF OF DEFENDANT-APPELLANT ARTIN H. COLOIAN

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STATEMENT OF JURISDICTION

On June 29, 2000, in the matter of the *United States of America v. Cianci, et al.*, a multi count indictment was filed in the United States District Court for the District of Rhode Island, charging various persons with violations of the United States Code. The indictment, docket number 1:00CR 00083-T-3 charged The Defendant-Appellant, Artin H. Coloian, in Count 10: Conspiracy to Commit Bribery in violation of 18 U.S.C. § 371 and 18 U.S.C. § 666(a)(l)(B) and Count 11: Bribery in violation of 18 U.S.C. § 666(a)(l)(B). The District Court for the District of Rhode Island had jurisdiction pursuant to 18 U.S.C. § 3231.

On June 27, 2002, a jury returned not guilty verdicts in favor of Mr. Coloian. Mr. Coloian filed a Motion to Expunge and a Motion to Seal his records on December 8, 2005. The matters were heard on February 10, 2006, at which time the district court denied the motions. On February 15, 2006, the judgment was entered and a Notice of Appeal was filed. The Court of Appeals has jurisdiction pursuant to the provisions of 28 USC § 1291.

STATEMENT OF THE ISSUES

A. DOES THE DISTRICT COURT HAVE JURISDICTION TO ORDER THE EXPUNCTION OR SEALING OF RECORDS OF A PERSON ACQUITTED OF ALLEGED FEDERAL CRIMINAL ACTIVITY?

B. DID THE DISTRICT COURT APPLY THE PROPER STANDARD IN RULING ON THE MOTION TO EXPUNGE OR SEAL RECORDS?

C. DID THE DISTRICT COURT ABUSE ITS DISCRETION IN DENYING THE MOTION TO EXPUNGE?

STATEMENT OF THE CASE

On June 29, 2000, an indictment was filed in the United States District Court for the District of Rhode Island charging the Defendant-Appellant, Artin H. Coloian, with Conspiracy to Commit Bribery in violation of 18 U.S.C. § 371 and 18 U.S.C. § 666(a)(l)(B) and Bribery in violation of 18 U.S.C. § 666(a)(l)(B). Mr. Coloian's case was severed from the other co-defendants and he was tried separately. On June 27, 2002, after trial before a jury, Mr. Coloian was found not guilty of the charges alleged in the indictment.

On December 8, 2005, Mr. Coloian filed a Motion to Expunge and a Motion to Seal Records. These matters were combined. On February 10, 2006, the District Court denied his motion. Judgment entered on February 15, 2006, and a Notice of Appeal was filed on the same date.

STATEMENT OF FACTS

At the time the indictment was filed, Mr. Coloian was the Chief of Staff to Mayor Vincent A. Cianci's and an attorney admitted to practice law in the State of Rhode Island and the Commonwealth of Massachusetts. He was charged in Count with Conspiracy to Commit Bribery in violation of 18 U.S.C. § 371 and 18 U.S.C. § 666(a)(l)(B) and Bribery in violation of 18 U.S.C. § 666(a)(l)(B). App. pp. 1-4. Mr. Coloian was tried separately before a jury on June 24, 2002.

The indictment alleged that David Ead[1] paid a sum of money to Mr. Coloian, as directed by Vincent A. Cianci, Jr., to secure employment for Christopher Ise with the City of Providence. David Ead was the main witness for the prosecution. On June 27, 2002, after the testimony of the David Ead was read back to the jury, the jury continued

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[1] In 1999, David Ead was charged in *United States of America v. Pannone, et al*, Cr. No. 1:99-CR-00060-L-2. Ead testified before a grand jury in the matter of the *United States of America versus Vincent Cianci, et al.* and at the trial.

deliberations and returned a verdict of not guilty. [D.E. jury deliberations] App. pp 5.

Mr. Coloian filed a Motion to Expunge and a Motion to Seal the records pertaining to the charges alleged in the indictment. In his memorandum in support of his motions, he advised that he continues to live with the pronounced stigma of having been charged, which is extreme and unusual and impedes his ability to practice law and conduct business.[2] In his reply to the government's response to his motions, Mr. Coloian alleged that "during the course of the grand jury proceeding, a juror complained that the Government was uncooperative with the Grand Jury and asserted that the prosecution was withholding material information on the case[3] and that the continuing stigma, which was the result of an over zealous government prosecution, affects his practice of law, where character and reputation are the foundation of credibility and effective representation of clients.[4]

The district court in denying the motions to expunge and seal, stated "that the few cases that have addressed the question that courts do have inherent authority and inherent control over their records and can, in appropriate circumstances, expunge record, but that power should be very sparingly exercised." Add., @ 13. Expungement "is reserved for extreme circumstances such as where for example, an arrest or a conviction was obtained unconstitutionally or it's unlawful or invalid or perhaps, ever where the record in question imposes a very unjust and extreme hardship on the individual seeking expungement." Add., @ 13, 14. The court found that it has inherent power to exercise jurisdiction to

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[2] Memorandum of Defendant-Appellant in Support of his Motion to Expunge pp. 1,2.

[3] The government did not refute this.

[4] Defendant-Appellant's Reply to Governments Memorandum of Law in Support of its Consolidated Response pp. 3-4, 5.

expunge where the record was the result of "something unlawful or unconstitutional and whether it poses some extreme hardship or works some extreme hardship on the individual seeking expungement". Add., @ 14.

SUMMARY OF ARGUMENT

This Court must determine whether the district court, properly exercised jurisdiction in considering an expunction of records, whether the district court applied the proper standard in ruling on said motions to expunge and seal and whether the district court improperly denied the motion. This Court reviews the jurisdictional issues *de novo* and determines whether the court's reliance on certain factors in its ruling constitutes an abuse of discretion.

ARGUMENT

DOES THE DISTRICT COURT HAVE JURISDICTION TO ORDER THE EXPUNCTION OR SEALING OF RECORDS OF A PERSON ACQUITTED OF ALLEGED FEDERAL CRIMINAL ACTIVITY?

There is a division among the courts as to whether the district court has jurisdiction to order the expunction of criminal records. Whether the district court has jurisdiction to order or deny the expunction of criminal records is a matter of law and is reviewed *de novo*. *U.S. v. Lahey Clinic Hospital, Inc.*, 399 F.3d 1 (1st Cir. 2005). Federal courts are courts of limited jurisdiction. "They possess only that power authorized by the Constitution and statues, which is not to be expanded by judicial decree. *Kokkonen v. Guardian Life Ins. Co.*, 5 11 U.S. 375, 377 (1994) (citations omitted). 18 U.S.C. § 3231 confers original subject matter jurisdiction upon the federal district court of all offenses against the laws of the United States. Mr. Coloian was charged with violations of federal law, therefore the District Court acquired jurisdiction over matters related to these offenses. The District Court for the District of Rhode Island has previously determined that the court has inherent power to order the expunction of arrest records. *Natwig v. Webster*, 562 F. Supp. 225, 227 (D. R.I.

1983). The Second, Third, Fourth, Seventh, Eighth, Ninth and Tenth Circuits have found that a court's jurisdiction over expungement matters is dependant upon circumstances surrounding the request.

The Second and Tenth Circuit have determined that the district court had ancillary jurisdiction to address a motion by a criminal defendant to have his arrest record expunged, and fingerprints and arrest photographs returned, following the dismissal of his indictment. *United States v. Schnitzer*, 567 F.2d 536, 538 (2d Cir. 1977), *cert. denied*, 435, U.S. 907, 98 S. Ct. 1456, 55 L.Ed.2d 499 (1978). The court noted that the power to expunge should be used narrowly, not for each case ending in an acquittal, but should be reserved for the unusual or extreme case. *Id.* @ 539-540 quoting *United States v. Linn*, 513 F.2d 925, 927, (10th Cir. 1975), *cert. denied*, 423 U.S. 836, 96 S.Ct. 63, 46 L.Ed.2d 77 (1975). In *United States v. Friesen*, 853 F.2d 816 (10th Cir. 1988), the district court found that an attorney who was acquitted of drug offenses would be grievously injured in his professional career. In *Friesen*, the Circuit Court remanded the case for an evidentiary hearing to determine whether the attorney could prove such injury and whether it would be so compelling to cause the court to use the "narrow" power of expungement. *Id.* @ 818.

The Third and Ninth Circuits have found that the federal court has subject matter jurisdiction to determine petitions for expungement only when the validity of the underlying criminal proceeding is challenged. *United States v. Rowlands*, 451 F.3d 173 (3rd Cir. 2006) (expunction denied where petitioner, previously indicted, tried and convicted, sought expunction on equitable grounds and failed to challenge the validity of the arrest and conviction). In *United States v. Crowell*, 374 F.3d 790 (9th Cir. 2004), Crowell attempted to collaterally challenge the validity of her conviction by way of a request for expungement. The court, in declining jurisdiction over Crowell's request, acknowledged that it possessed ancillary jurisdiction to expunge criminal records

however "a district court's ancillary jurisdiction is limited to expunging the record of an unlawful arrest or conviction, or to correcting a clerical error." *Id.* at 793, *quoting United States v. Sumner*, 226 F.3d 1005, 1014 (9th Cir. 2001).

The Seventh Circuit will exercise jurisdiction over expunction of records wherein it employs a balancing test between the adverse consequences suffered by the individual against the public interest in maintaining accurate, undoctored records. *United States v. Flowers*, 389 F.3d 737 (7th Cir. 2004). The court noted that expungement is an extraordinary remedy. *Id.* at 739.

A district court may have ancillary jurisdiction to expunge criminal records in extraordinary cases to preserve its ability to function successfully by enabling it to correct an injustice caused by an illegal or invalid criminal proceeding. That ancillary jurisdiction does not extend to expungement of a criminal conviction where the petitioner asserts solely equitable grounds. *United States v. Meyers*, 401 F.3d 959 (8th Cir. 2005).

"Once subject matter jurisdiction has properly attached, courts may exceed their authority or otherwise err without loss of jurisdiction." *Prou v. United States*, 199 F.3d 37, 45 (1st Cir. 1999). The District Court for the District of Rhode Island acquired subject matter jurisdiction once the indictment was filed against Mr. Coloian, His motions relate to the charges contained in the indictment and remain a public record and record of the district court, therefore the court continued to have jurisdiction over this matter. The district court properly determined that it had jurisdiction over expunction of records.

DID THE DISTRICT COURT APPLY THE PROPER STANDARD IN RULING ON THE MOTION TO EXPUNGE OR SEAL RECORDS OF AN ACQUITTED PERSON?

The district court determined that there are limited circumstances that justify exercising the Court's inherent

power to expunge arrest, criminal records and charging documents, namely whether the record is the result of something unlawful or unconstitutional or whether it poses some extreme hardship or works some extreme hardship on the individual. Add., @ 14. The hardship alleged by Mr. Coloian is the stigma that attached to him and it's interference with his law practice and business. The court found that Mr. Coloian failed to satisfy that criteria. This court reviews rulings of law *de novo*. *U.S. v. Lahey Clinic Hospital, Inc.*, 399 F.3d 1 (1st Cir. 2005).

In *Natwig v. Webster*, 562 F. Supp. 225, 227 (D. R.I. 1983), the Plaintiff sought injunctive relief requiring the Director of the F.B.I. to expunge his record. He had been charged with extortion while he was a student at Brown University. The matter was presented to a grand jury, which returned a "no true bill". The record of Plaintiff's arrest, however, became a permanent record of the F.B.I.[5]

The Plaintiff alleged that his arrest record has in the past and will in the future create a false and misleading impression of him, cause him to suffer disrespect and stymie his potential for employment. *Natwig* @ 226. The Plaintiff also contended that the dissemination of his arrest violated his right to privacy as guaranteed by the First, Fourth and Fifth Amendments to the United States Constitution. *Id.* @ 227. Without addressing whether dissemination violated the Plaintiff's right to privacy, the court found that unusual or exceptional circumstances existed that justify the exercise of the court's equitable powers. *Id.* @ 231.

In *Natwig*, a distinguishing factor considered by the court in rendering its decision was the fact that a grand jury chose to issue a "no true bill" rather than a dismissal of an indictment

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[5] It is not clear whether the arrest and grand jury proceedings involving Mr. Natwig involved a federal or state prosecution agency. If it was a state prosecution, ancillary jurisdiction would not apply.

by the prosecution or an acquittal after trial. *Natwig* @ 230. In the instant case, a grand jury returned an indictment against Mr. Coloian. The court noted that there was nothing that suggests that the charges against Mr. Coloian were unlawful or unconstitutional. Add., @ 15.

An indictment indicates that a grand jury found probable cause to issue a charge against an individual. It is a well known fact, that testimony presented to a grand jury is not subject to the safeguards of cross examination by an attorney representing the interests of accused in order to challenge the reliability of that testimony. Although an indictment indicates that a grand jury found probable cause to issue a criminal charge, probable cause based upon the unchallenged testimony of a person such as David Ead, who had his own liberty interests to protect, is unimpressive. Once Mr. Ead's credibility was scrutinized, the jury returned a not guilty verdict.

Mr. Coloian, indicated that a juror complained that the Government was uncooperative with the grand jury and asserted that the prosecution was withholding material information.[6] There have been instances in which individuals have been falsely accused, indicted and convicted. It is conceivable that a witness who is under indictment and whose own liberty interests are at stake, may give false testimony to a grand jury in order to serve or further his own interests.

In the instant case, Mr. Coloian was acquitted of the crime of Conspiracy to Commit Bribery and Bribery. Bribery is clearly a crime of dishonesty. The government decides which citizen will be investigated or prosecuted and the government has discretion to discontinue a prosecution, after indictment. A crime of dishonesty involves some element of deceit, untruthfulness, or falsification. *United States v. Tracy*, 36

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[6] Defendant-Appellant's Reply to Government's Memorandum of Law in Support of its Consolidated Response pp. 3-4.

F.3d 187, 192 (1st Cir. 1994). The allegation that one committed a crime of dishonesty, by way of indictment, calls to question to character and affects the reputation of the accused because of the nature of the charge. It is unfair and serves no legitimate purpose to require Mr. Coloian, who had no prior criminal contact or arrest, to live with the stigma attached to him by a failed prosecution.

28 U.S.C. § 534(a)(1) authorizes the Attorney General to acquire, collect, classify, and preserve identification, criminal identification, crime, and other records. However, 28 U.S.C. § 534(E)(2)(A) provides that the information to be entered into databases may include "arrests, convictions, and arrest warrants for stalking or domestic violence or for violations of protection orders for the protection of parties from stalking or domestic violence". Mr. Coloian noted that the Attorney General disseminates this information to bank, credit agencies, professional employment insurance companies. Add., @ 4. This exceeds scope of 28 U.S.C. § 534 and such dissemination may impose a tremendous hardship on an individual.

The government noted that "the jury chose - ruled that the Government had not met its substantial burden of proof to prove him guilty beyond a reasonable doubt, and he was acquitted. God bless him." Add., @ 9, 10. Later, the government pointed out that "probation officers routinely have a section in their presentence report citing other criminal conduct, that is exactly the kind of thing that if Mr. Coloian is here again that a probation officer would describe to the court. Add., @ 12. The district court queried, "doesn't the person to whom Mr. Coloian may be applying for whatever, have a right to know all of the facts and then determine for themselves whether they think that this incident disqualifies him or should be held against him?" Add., @ 5.

The statements by the court and the government highlight the stigma that attaches to an accused person, whether they are acquitted or not. The existence of arrest records and

references to Mr. Coloian in court documents perpetuate the mistaken belief that exists in our society, that if formerly charged, a person must be guilty of some wrongdoing. The public's interest will not be served by maintaining the records on Mr. Coloian.

A jury acquitted Mr. Coloian of both criminal offenses. The laws of the United States of America are a system of checks and balances designed to afford all persons protection from unreasonable, government interference into one's private life. Mr. Coloian's right to privacy is greater than the public's need to know that the government alleged that he engaged in criminal conduct.

Each time he has to explain the circumstances surrounding the indictment and the acquittal, he has to relive the governments intrusion into his life, which is akin to being sanctioned for having been accused of a crime. As a result of the accusations contained in the indictment, Mr. Coloian lives under a cloud of suspicion. The damage to his reputation constitutes extreme hardship.

Crimes of dishonesty are of such character that these crimes are treated differently under Rule 609 of the Federal Rules of Evidence. Rule 609(a)(l) of the Federal Rules of Evidence allows the use of prior convictions for the purpose of impeachment if the prior conviction is for a crime, punishable by death or imprisonment in excess of one year. Rule 609(a)(2) allows the use of a prior conviction, regardless of the penalty, where the prior conviction is a crime of dishonesty or false statement. The purpose of impeachment evidence is to attack the credibility of a witness. The Rules of Evidence recognize that a conviction of a crime of dishonesty should be considered in determining the worthiness of a witness testimony. In *Natwig v. Webster*, 562 F.2d 225,228 (D.R.I. 1983), the court noted that "it would appear that an acquittal, standing alone, is not sufficient to warrant an expunction of an arrest record". However, the court noted that "it is well recognized that: Information denominated a

record of arrest, if it becomes known, may subject an individual to serious difficulties. Even if no direct economic loss is involved, the injury to an individual's reputation may be substantial." *Natwig* @ 229. "Opportunities for schooling, employment or professional licenses may be restricted or nonexistent as a consequence of the mere fact of an arrest, even if followed by an acquittal or complete exoneration of the charges involved. *Id.*

It is clear that the district court may exercise discretion and expunge the record of a conviction. Although different states may define "expungement" differently, "in general when a defendant moves to expunge records, she asks that the court destroy or seal the records of the fact of the defendant's conviction and not the conviction itself." *United States v. Crowell*, 374 F.3d 790, 792 (9th Cir. 2004). The standard for expunction should differ between persons convicted of criminal conduct and those acquitted of criminal wrongdoing. An acquittal should enable a citizen to protect his or her right to privacy by way of expungement.

The nature of the charges brought against him creates an undue hardship and affects his reputation. By seeking an expungement he is trying to maintain his privacy, restore his dignity and remove the stigma that attached to him from the government's accusations.

DID THE DISTRICT COURT ABUSE ITS DISCRETION IN DENYING THE MOTION TO EXPUNGE?

The district court determined that there are limited circumstances that justify exercising the Court's inherent power to expunge arrest, criminal records and charging documents, namely whether the record is the result of something unlawful or unconstitutional or whether it poses some extreme hardship or works some extreme hardship on the individual. Add., @ 15. The court found that "there was nothing to suggest that the charges were unlawful or unconstitutional or that there was anything about the Grand Jury's proceedings that could be categorized as such." Add.,

@ 15. The court also found that Mr. Coloian failed to show that the existence of the indictment, the record of indictment and subsequent acquittal has disqualified him for anything. Add., @ 16. The court indicated that the court record includes the Jury's acquittal and that mitigates any argument that Mr. Coloian suffers some unusual or extreme hardship as a result of this record. Add., @ 16. "An abuse of discretion occurs when a relevant factor deserving significant weight is over looked, or when an improper factor is accorded significant weight, or when the court considers the appropriate mix of factors, but commits a palpable error of Judgment in calibrating the decisional scales". *United States v. Gilbert*, 229 F.3d 15, 21 (1st Cir. 2000). In arriving at its decision, the district should have considered the nature of charges as a factor in determining whether there may be an unusual or extreme hardship.

Mr. Coloian is a practicing attorney in the State of Rhode Island. An attorney holds a fiduciary relationship with a client and is held to a high standard in accordance with the code of professional responsibility. Mr. Coloian advised the court that he has to explain why he was charged to prospective clients who approach him on a regular, weekly basis. Add., @ 7.

The government accused Mr. Coloian of the type of criminal conduct, which has an element of deceit. Crimes of this nature raise suspicion as to the character and credibility of the accused. The injury to an individual's reputation may be substantial." *Natwig v. Webster*, 562 F.2d 225, 229 (D.R.I. 1983). Mr. Coloian asserted that he continues to live with the pronounced stigma of having been charged, which is extreme and unusual and impedes his ability to practice law and conduct business.[7] The court found that the recourse

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[7] Memorandum of Defendant-Appellant in Support of his Motion to Expunge pp. 1,2.

available to Mr. Coloian was to explain what the circumstances were and why this particular incident in his past either is insignificant or should be overlooked. Add., @ 16. Mr. Coloian's reputation has suffered as a result of the government's charges. The damage to Mr. Coloian's reputation constitutes an unusual and extreme hardship due the nature of the charges for which he was acquitted, his status as a former public official and his profession.

CONCLUSION

Based upon the foregoing, the judgment of the district court should be reversed and Mr. Coloian's request for expungement of records should be granted.

ARTIN H. COLOIAN
By his attorney,

/s/Mary June Ciresi
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Providence

ADDENDUM TO BRIEF ON APPEAL OF DEFENDANT-APPELLANT ARTIN H. COLOIAN

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

**********	*	
UNITED STATES OF AMERICA	*	C.R. 00-83t-03
vs.	*	FEBRUARY 10, 2006
ARTIN H. COLOIAN	*	11:00 A.M.
**********	*	PROVIDENCE, RI

BEFORE THE HONORABLE ERNEST C. TORRES
CHIEF DISTRICT JUDGE

(HEARING ON DEFENDANT ARTIN COLOIAN'S MOTION TO SEAL RECORD and MOTION TO EXPUNGE)

APPEARANCES:

FOR THE Government:	Terrence Donnelly, AUSA U.S. Attorney's Office 50 Kennedy Plaza Providence, RI 02903
FOR THE DEFENDANT:	Steven D. DiLibero, Esquire 130 Dorrance Street Providence, RI 02903
Court Reporter:	Angela M. Reynolds, RPR-FCRR One Exchange Terrace Providence, RI 02903

Proceeding reported and produced by computer-aided stenography

10 FEBRUARY 2006 -11:00 A.M.

THE COURT: Good morning.

THE CLERK: This is Criminal Action 00-83T, United States of America versus Artin Coloian.

THE COURT: This case is here for consideration of Mr. Coloian's motion to expunge the record of his indictment, and I guess, acquittal; is that right, Mr. DiLibero?

MR. DiLIBERO: That's correct, your Honor.

THE COURT: Counsel have both filed memoranda, so you don't need to repeat what you've said in the memoranda, but if you would like to add anything or expand on anything, you may each have ten minutes to argue. Mr. DiLibero?

MR. DiLIBERO: Thank you, your Honor. Your Honor, I'll begin by asking that both motions, as in my memo, be consolidated with your approval, the motion to seal and the motion to expunge.

THE COURT: The motion to seal? I know counsel –

MR. DiLIBERO: There was a motion to seal that was filed along with the motion to expunge. THE COURT: To seal the record, you mean?

MR. DiLIBERO: Yes. And I ask that they be consolidated.

Your Honor, in this country, any citizen, even one with an absolutely clean lifetime record of not violating the law, through a series of circumstances, or in this instance an occupational hazard, can find themselves unjustly charged with a violation of the law even though he may be entirely innocent of those charges. Fortunately, for our citizens, our justice system will in due course bring out the truth and he will be cleared. But this record would not be automatically removed as it would be in many states in this country and as it would be in the State of Rhode Island if this was a State proceeding. In Rhode Island State Court, as the Court is aware, there is an expungement statute, 12-1.3-1, which essentially allows a defendant who is acquitted or the case has been dismissed pursuant to a Superior Court or District Court rule, to move to have his records sealed and expunged. And oddly enough, your Honor, that order is sent to federal

agencies, and they comply with that order and they seal and expunge that defendant's record showing that the case has either been dismissed or he was found not guilty. Unfortunately, that does not apply here. Although Mr. Coloian has been exonerated and cleared, he still faces the stigma which hovers over him, and at any time in the future, the cloud of prosecution against him remains for whomever, or by one way or another, they may gain access to that record. 28 United States Code 534 allows the Attorney General to disseminate, collect, and record records from not only state proceedings, but also various agencies, and they're collected through that statute, and the Attorney General's allowed to disseminate them to various agencies. And those agencies are not just law enforcement agencies. They're banks, credit agencies, professional employment insurance companies. And also the information is given out when a person applies and is running for public office, that information is sent back to those people who are applying. And whether or not this information is disseminated, or, if at all ever disseminated, that question always remains. The Government has stated in its memorandum –

THE COURT: Let me just interrupt you a minute as these questions occur to me rather than holding them to the end. Is there any suggestion here that the fact that Mr. Coloian was indicted, tried and acquitted, would disqualify him for anything that he might apply for in the future?

MR. DiLIBERO: No, your Honor, but it does remain on his credit record. And every year when he fills out his professional responsibility questionnaire, he has to explain why he was arrested, why he was prosecuted, and why he was acquitted. If the case were sealed and expunged, he wouldn't have to give that explanation. As it relates to his credit history –

THE COURT: As far as his bar application is concerned, wouldn't the bar authorities have a right to know that and then to judge whether that had any impact on his fitness to practice

law? I mean isn't the question there whether the individual to whom this information is presented—doesn't the person to whom Mr. Coloian may be applying for whatever, have a right to know all of the facts and then determine for themselves whether they think that this incident disqualifies him or should be held against him?

MR. DiLIBERO: Well, your Honor, respectfully, Mr. Coloian was found not guilty by a jury of twelve of his peers. If this proceeding was in the State Court, he wouldn't have to answer that at all. And I believe under the decision his Honor Judge Pettine had in *Natwig*, he falls into the criteria that would allow this Court to exercise its discretion and expunge and seal his record.

THE COURT: Doesn't the fact that he was acquitted, though, remove much of the sting here? Doesn't it remove it from the realm of those cases where, let's say, if we're taking about an arrest, for example, an individual doesn't have an opportunity to contend that the arrest was improper, the arrest remains on the record, whereas here he's got an acquittal?

MR. DiLIBERO: Judge, that's an interesting question. Unfortunately, not everyone, as the people here gathered in this room, have that judicial mindset. People routinely ask Mr. Coloian, clients, financial institutions have, what does that actually mean, an acquittal? You know, why were you really arrested? Why were you prosecuted? What does that acquittal mean? A lot of people still believe that he's still facing an ongoing prosecution. It's unfortunate, but that's the stigma that he still possesses. Your Honor, I had noted in my memo the Natwig decision, and I state to the Court that at the very least, this is a very unusual and extreme case, and I believe it fits that criteria. This case began over 25 years ago with an investigation. It concluded with a 28-count indictment, of which Mr. Coloian was charged in two counts. This Court found it appropriate to separate and sever him for the prejudicial effect it could have on his trial. During the course of his trial and after, most unusual things happened; a

prosecutor was sanctioned, a reporter was held in contempt and unfortunately went to jail; and a criminal defense attorney was found in violation and found guilty and pled guilty to perjury and is serving a sentence today. Those things, your Honor, I believe, show that this is an unusual and extreme case. I'm asking the Court, based on those factors and the factors that Mr. Coloian faces this issue on a regular, weekly basis, people approach him and say, well, if I'm to hire you, can you explain why this happened? I believe by sealing and expunging his record, he can answer in the negative and state that he's never been arrested before and that his case has been sealed and he won't have to continue with this aura of prosecution and stigma that remains. And I'd ask, in the interest of justice, that you expunge and seal his record.

THE COURT: Should every defendant who is charged with a crime and acquitted have their record expunged?

MR. DiLIBERO: No, your Honor. I think each case should stand on its own two feet. As in *Natwig*, you have to take each case and look at it in the totality of all the circumstances combined. This case is very unusual. As I described, Mr. Coloian is in a difficult situation, he's an attorney, a practicing attorney. He's a member of the business community. And for him to continue to face these issues, I believe is unfair and unjust. That's why I'm suggesting that it's distinguished and stands out from the others.

THE COURT: Well, I don't quite understand the distinction. Why is his case different from that of any other individual who's been tried and acquitted?

MR. DiLIBERO: Judge, in the other cases that my brother has cited, in the *Flowers* case, that was a conviction of that individual, and their statement that in order to preserve judicial records for the purpose of sentencing and sentencing guidelines, there's a need to control those records and have them present when someone is to be sentenced. Mr. Coloian was not convicted, and there's no need to maintain any

records which would ever be used for a sentencing issue for him.

Thank you.

THE COURT: Mr. Donnelly?

MR DONNELLY: Yes, your Honor, relying on our Memorandum of Law.

Just very briefly. First, your Honor, I guess it's understandable, but the Government certainly does not agree with the proposition that the defendant was unjustly charged. The Government does not agree with the description that he was quote, "exonerated." The Government does not agree with the phrase my brother used that he was cleared.

This defendant was justly charged. A Grand Jury lawfully gathered evidence over several months, I don't know what 25-year description he's referring to, but the Grand Jury heard evidence over several months and indicted this defendant. No challenge was ever made to that indictment, say for the motion to sever, and even there the Court granted, not the mandatory severance, but the discretionary severance, and the Court was well within its discretion in giving Mr. Coloian a separate trial. The defendant was justly charged after the Grand Jury heard the evidence. He was justly tried. And the jury chose—ruled that the Government had not met its substantial burden of proof to prove him guilty beyond a reasonable doubt, and he was acquitted. God bless him.

Well, to add on to that, your Honor, we come back to the original question that the Government poses, and I think the Court, when it took the bench posed as well, what are we doing here? What is the defendant seeking specifically for this Court to do?

You'll note that in his motion he asked the Court to seal or expunge, quote, "his record." His record of what? What records of this Court is he specifically seeking? I'm presuming that we're here on the judicial records kept by this Court, and that seemed to be the answer that Mr. DiLibero

gave the Court. But it's still kind of vague to me. If the Court grants the motion, are you to parse out between the, presumably, thousands of pages of records from the Plunder Dome Trial any reference to Mr. Coloian? Is the Court to go through the Grand Jury transcripts for any and all references to Mr. Coloian?

His problem here, to get to the crux of it, your Honor, his problem here is not with this Court, his problem is not with this Court's records. It's with the publicity that the case had and his objections to how that publicity has played out over time. That's something that's beyond this Court's control or the Government's control.

What Judge Pettine said in the *Natwig* decision, I think, is very instructive. *Natwig*, decided back in 1983, regarding a 1968 case, and moving on through time to the cases cited by whoever, they've all required the defendant to show one thing: Extraordinary circumstances. Yes, the State has a statute. Congress has had various proposals for expungement statutes brought before it from time to time and they have rejected them on a consistent basis. This Court simply has no general expungement power. And so the references to state law, I'm sure Mr. Coloian would wish the state law were here, but it's not. Congress for valid policy reasons chose to reject such a policy. And so we come down to however one phrased it, the Government phrased it in the term does this Court have subject matter jurisdiction, over this motion, the Government concedes that there has to be some extreme cases where the Court could exercise some minimal jurisdiction over a motion such as this. But if you look at the cases, including *Natwig*, the defendant has to make a much greater showing of the justification to reach into this Court's records, to this Court's Grand Jury proceedings, to this court's pleadings that it keeps for itself. And they could have a future use, as this Court knows, should Mr. Coloian come before the Court on any future case. The probation officers routinely have a section in their presentence report citing other criminal conduct, this is exactly the kind of thing that if Mr. Coloian is here again that

a probation officer would describe to the Court. And so they would have a future use for even in that realm.

So what are the extraordinary circumstances? In *Natwig*, the defendant came forward with evidence of communications between potential employers about his arrest. He had difficulties traveling to another country, Austria, I believe, because he was a professor and wanted to travel on sabbatical. He brought all of these specifics facts to Judge Pettine, and Judge Pettine said, quote – while Judge Pettine ruled that those extraordinary circumstances were present for Mr. Natwig, but he said "Nevertheless, the Court's remedial power is not unlimited. There must be a logical relationship between the injury and the requested remedy."

Now, Mr. Coloian is requesting that you seal your records here, or that you destroy your records and send them down the memory hole. But he has shown – there is no showing that the problem he complains about is due to this Court maintaining its records. It's due to extraneous and outside factors that, frankly, whatever you rule today will have no bearing on.

So for all these reasons, your Honor, the Government objects to the defendant's motions.

THE COURT: Mr. DiLibero, do you wish two minutes to respond to anything that Mr. Donnelly said?

MR. DILIBERO: No thank-your Honor.

THE COURT: Well, one of the points that counsel addressed in their memos or at least the Government did, which I feel I should respond to even though it wasn't expressly argued here, is the subject of the Court's jurisdiction, whether the Court has jurisdiction even to entertain a motion of this type. There is nothing that I'm aware of or that counsel have called to my attention that either expressly authorizes or prohibits a court from expunging the records of proceedings before it. And it seems to me, I think this is confirmed by the few cases that have addressed the question that courts do have inherent authority and inherent

control over their records and can, in appropriate circumstances, expunge records, but that power should be very sparingly exercised. It's reserved for extreme circumstances such as where, for example, an arrest or a conviction was obtained unconstitutionally or it's unlawful or invalid or, perhaps, even where the record in question imposes a very unjust and extreme hardship on the individual seeking expungement.

Expungement is not a tool to rewrite history nor is it a tool to be used to seal otherwise public records. Those are very extreme steps and they are reserved for extreme situations. We all have events in our past, I'm sure, that may have been unpleasant and that we would like to erase, and some of them, the records of some of them may have some potentially adverse consequences of varying degrees, but I think the recourse in those situations is to explain to the person or organization what the circumstances were and why this particular incident in your past either is insignificant or should be overlooked.

Expungement is a very drastic remedy and puts us on somewhat of a slippery slope. You get into questions like when should a record be expunged. The question that I posed to Mr. DiLibero, which I think he had some understandable difficulty answering is if the Court expunges the record in Mr. Coloian's case, does that mean that any individual who was ever charged with a crime and acquitted should have the record expunged? I don't think even M. DiLibero is urging that, but I don't really see how one can make these fine distinctions except on the basis of when the charge may have been unconstitutional or the conviction was invalid, which is not the case here. Another question that one encounters on this slippery slope is what is it that we are expunging. As Mr. Donnelly said, does the Court have to go back and redact the transcripts of the Grand Jury proceedings and the trial to eliminate any references to Mr. Coloian. So the two benchmarks, it seems to me, in determining whether the limited circumstances that justify exercising the Court's

inherent power to expunge are whether the record was the result of something unlawful or unconstitutional and whether it poses some extreme hardship or works some extreme hardship on the individual seeking expungement. And in this case I don't think either of those criteria has been satisfied. I don't think there's anything even approaching satisfaction of either of those criteria. There's nothing that suggests that the charges against Mr. Coloian were unlawful or unconstitutional or that there was anything about the Grand Jury's proceedings that could be categorized as such. The Grand Jury indicted Mr. Coloian. I certainly understand his feelings. He was acquitted. He feels that these charges were unfounded, but that doesn't render the indictment unlawful or unconstitutional in any way, particularly when you consider that the indictment is based on a finding by the Grand Jury that there was probable cause to try Mr. Coloian, whereas the Jury's verdict is a finding that the Government failed to prove those charges beyond a reasonable doubt. So the fact that he was acquitted does not render the Grand Jury's indictment unlawful, unconstitutional, or in any way invalid. As far as the other prong is concerned, the extreme hardship, again, there has been no showing here that the existence of the indictment, the record of the indictment and the subsequent acquittal has disqualified Mr. Coloian for anything. There's been—in fact, but for the acquittal, maybe there would be an argument there, but the record includes not only the fact that Mr. Coloian was indicted and charged, but also that a Jury acquitted him. So that mitigates, I think, any argument that Mr. Coloian suffers some unusual or extreme hardship as a result of this record being in the Court file. As I indicated, he is certainly free to explain to others who may question his fitness for any position that he applies for or for anything that he does, he's got the acquittal on record and he can explain, and the party to whom this information is presented has, I think, a right to know it and make a judgment for themselves as to whether they believe it's a factor to be taken into account in connection with whatever Mr. Coloian has applied for. So

the motion for expungement and the companion motion to seal are denied.

Court will be in recess.

(ADJOURNED 11:35 A.M.)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND UNITED STATES OF AMERICA

For reasons stated in open court on February 20, 2006, Defendant's Notions to Seal and Expunge the Record are hereby **DENIED**.

Enter:

/s/ Ernest C. Torres
Ernest C. Torres
Chief Judge

Date: 2/14/06

No. 06-1357

UNITED STATED COURT OF APPEALS

FOR THE FIRST CIRCUIT

UNITED STATES

Appellee

v.

ARTIN H. COLOIAN

Defendant – Appellant

On Appeal From A Judgment Of The
United States District Court For The
District of Rhode Island
Honorable Ernest C. Torres,
Chief District Judge

APPENDIX OF BRIEF OF DEFENDANT-APPELLANT ARTIN H. COLOIAN

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unlawfully obstructed, delayed, and affected commerce and the movement of articles and commodities in commerce by extortion, in that Defendants VINCENT A. CIANCI, JR., a/k/a "Buddy," FRANK E. CORRENTE, and JOSEPH A. PANNONE, and others known to the Grand Jury, unlawfully obtained from the Estate of Fernando M. Ronci and its Executors, with their consent, wrongfully induced by fear of economic harm, and under color of official right, approximately $15,000 which was not due Defendants, or their public off ices.

All in violation of 18 U.S.C. §§ 1951 (a) and 2.

COUNT X

(Ise Job)
(Federal Bribery Conspiracy)
18 U.S.C. §§ 371 and 666(a) (1)(B)

161. The allegations contained in ¶¶ 1 through 3, 6, 15, and 30 are incorporated by reference.

162. At all times relevant to this Count:

a. The Department of Planning and Development within the City of Providence was an agency of the City of Providence that received federal assistance in excess of $10,000 during the one year period beginning in or about July 1, 1996 and ending in or about June 30, 1997; and

b. Defendants VINCENT A. CIANCI, JR., a/k/a "Buddy," and ARTIN H. COLOIAN were agents of the Department of Planning and Development where Defendant VINCENT A. CIANCI, JR., a/k/a "Buddy," was the City's Chief Executive and Administrative Officer and Defendant ARTIN H. COLOIAN was an Executive Assistant to CIANCI.

163. From in or about October 1996 through in or about February 1997, in the District of Rhode Island, Defendants VINCENT A. CIANCI, JR., a/k/a "Buddy," and ARTIN H.

COLOIAN, and others known and unknown to the Grand Jury, did unlawfully, willfully, and knowingly combine, conspire, confederate, and agree among themselves and with each other, to commit certain offenses against the United States, that is, to knowingly and corruptly, solicit, demand, accept, and agree to accept something of value, that is, $5,000 in United States currency from Christopher Ise, intending to be influenced and rewarded in connection with a transaction of the City of Providence, Department of Planning and Development, involving something of value of $5,000 or more, that is, the hiring of Christopher Ise by the Department of Planning and Development, in violation of 18 U.S.C. § 666(a)(1)(B).

OBJECT OF CONSPIRACY

164. The object of the conspiracy was to obtain $5,000 for Defendant VINCENT A. CIANCI, JR., a/k/a "Buddy," from Christopher Ise in exchange for giving Mr. Ise employment with the City of Providence.

OVERT ACTS

In furtherance of the conspiracy and to effect the objects of the conspiracy, Defendants and others, known and unknown, committed and caused to be committed the following overt acts, among others not listed, in the District of Rhode Island:

165. In or about December 1996 and January 1997, Defendant VINCENT A. CIANCI, JR., a/k/a "Buddy, agreed to accept $5,000 for giving employment to Christopher Ise.

166. On or about January 15, 1997, Defendant VINCENT A. CIANCI, JR., a/k/a "Buddy," and David C. Ead met with Christopher Ise in CIANCI's City Hall office.

167. In or about January 1997, Defendant VINCENT A. CIANCI, JR., a/k/a "Buddy," telephoned the Deputy Director of Providence's Department of Planning and Development and instructed him to hire Mr. Ise.

168. On or about January 21, 1997, Christopher Ise was hired by the City of Providence, Department of Planning and Development.

169. In or about February 1997, Christopher Ise delivered $5,000 to David C. Ead.

170. In or about February 1997, David C. Ead took the $5,000 to Defendant VINCENT A. CIANCI, JR., a/k/a "Buddy," in CIANCI's City Hall office.

171. In or about February 1997, Defendant VINCENT A. CIANCI, JR., a/k/a "Buddy," told David C. Ead to give the cash to Defendant ARTIN H. COLOIAN and "not to be nervous."

172. On or about February 1997, David C. Ead delivered the $5,000 in cash to Defendant ARTIN H. COLOIAN as directed by Defendant VINCENT A. CIANCI, JR ., a/k/a "Buddy."

All in violation of 18 U.S.C. §§ 371 and 666 (a)(1)(B).

COUNT XI

(Ise Job)
(Federal Bribery)
18 U.S.C. §§ 666(a)(I)(B) and 2

Introduction

173. The allegations contained in ¶¶ 1 through 3, 6, 15, 30, 162, 165 through 172 are incorporated by reference.

The Bribe

174. In or about February 1997, in the District of Rhode Island, Defendants VINCENT A. CIANCI, JR., a/k/a "Buddy" and ARTIN H. COLOIAN, and with others known and unknown to the Grand Jury, aiding and abetting each other, corruptly accepted and agreed to accept something of value, that is, $5,000 in United States currency from Christopher Ise, intending to be influenced and rewarded in connection with a transaction of the City of Providence, Department of Planning and Development, involving something of value of $5,000 or more, that is, the hiring of Christopher Ise by the Department of Planning and

Development. All in violation of 18 U.S.C. §§ 666(a)(1)(B) and 2.

COUNT XII

(Lots)
(Hobbs Act Conspiracy)
18 U.S.C. § 1951(a)

175. The allegations contained in ¶¶ 1 through 3, 7, 15 through 16, 23, and 30 are incorporated by reference.

06/21/2002	485	MOTION by Artin H Coloian to Continue Trial (Mercurio, A) (Entered: 06/21/200)
06/21/2002	486	ORDER as to Artin H Coloian denying [485-1] motion to Continue Trial as to Artin H Coloian (3) (Signed by Judge Ernest C. Tones) (faxed to counsel of record) (Mercurio, A) (Entered: 06/21/2002)
06/21/2002	488	(2) SUBPOENAES Returned Subpoenaes served on Channel 10 -WJAR and David Ead (Mercurio, A) Entered: 06/21/2002)
06/21/2002		MEMORANDUM by Artin H Coloian in support of [485-1] motion to Continue Trial (Mercurio, A) (Entered: 06/21/2002)
06/24/2002		Jury trial (DAY 1) as to Artin H Coloian held before J. Torres. Jury is brought in and sworn. Preliminary instructions are given to jurors. Donnelly presents opening statement for Govt. Tarantino presents opening statement for deft. Govt. presents its case. One witness is sworn and 6 exhibits are admitted into evidence.

		Alternate Juror #2 is excused. (Mercurio, A) (Entered: 06/25/2002)
06/25/2002		Jury trial (DAY 2) as to Artin H Coloian held before J. Torres. All counsel are present. Govt. witness 1 returns to stand. Four witnesses are sworn and 4 exhibits are admitted into evidence. Govt. rests. Tarantino moves for judgment of acquittal. Donnelly argues objection. Court DENIES motion for judgment of acquittal as to both counts. Deft. rests and renews motion for judgment of acquittal. Court denies motion for reasons previously stated. (Mercurio, A) Modified on 06/25/2002 (Entered: 06/25/2002)
06/26/2002		Jury trial (DAY 3) as to Artin H Coloian held before J. Torres. All counsel are present. Counsel present closing arguments. Jury is charged. Alternate jurors excused. Marshall is sworn. Jurors commence deliberations. (Mercurio, A) (Entered: 06/26/2002)
06/27/2002		**Terminated document(s) as to Vincent A Cianci, Frank E. Corrente, Artin H Coloian, Richard E Autiello, Edward Voccola, Joseph Pannone : denying [480-1] motion for Judgment of Acquittal Prior to Verdict Pursuant to Rule 29(b) as to Richard E Autiello (4), denying [474- 1] motion to Strike as to Richard E Autiello (4), denying [474-2] motion for Judgment of Acquittal as to Richard E Autiello (4)

		(FarrellPletcher, P) (Entered: 06/27/2002)
06/27/2002		Jury trial (DAY 4) as to Artin H Coloian held before J. Torres. All counsel are present. Jurors resume deliberations. Testimony of David Ead is read back to jurors. Jurors reach a verdict of not guilty. (Mercurio, A) (Entered: 06/27/2002)
06/27/2002	95	JURY VERDICT as to Artin H Coloian Not Guilty: Artin H Coloian (3) count(s) 10, 11 (Mercurio, A) (Entered: 06/27/2002)
06/27/2002	496	Minute entry as to Artin H Coloian : Jury trial held before J. Torres 6/24/02 through 6/27/02 (Mercurio, A) (Entered: 06/27/2002)
06/27/2002	497	REDACTED INDICTMENT as to Artin H Coloian (Mercurio, A)

No. 06-1357

UNITED STATED COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

ARTIN H. COLOIAN
Defendant – Appellant.

On Appeal From A Judgment Of
The United States District Court
For The District of Rhode Island

BRIEF FOR THE APPELLEE UNITED STATES OF AMERICA

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September 26, 2006

I. STATEMENT OF THE ISSUES

1. Whether a district court has subject-matter jurisdiction to expunge records of a criminal proceeding based purely on equitable considerations.

2. Whether, assuming *arguendo* that such jurisdiction exists, the district court abused its discretion in ruling that expungement was not warranted under the circumstances.

II. STATEMENT OF THE CASE

On April 2, 2001, a federal grand jury returned a superseding indictment charging various public corruption offenses and naming six defendants: Vincent A. Cianci, Jr., the Mayor of Providence; Frank E. Corrente, the Mayor's Director of Administration; defendant-appellant Artin H. Coloian, the Mayor's Chief of Staff; Joseph A. Pannone, the Chairman of the Providence Board of Tax Assessment Review; Richard E. Autiello, a member of the Providence City Towing Association; and Edward E. Voccola, a businessman who leased buildings to the city. (Docket No. 68.) Pannone pled guilty prior to trial. Voccola won a motion for judgment of acquittal. Cianci, Corrente, and Autiello were convicted of various counts. Their convictions were upheld on appeal. *See United States v. Cianci*, 378 F.3d 71 (1st Cir. 2004).

Coloian's case was severed and he proceeded to trial on the two counts naming him. (Defense Appendix at 1-5.) Those counts charged bribery and bribery conspiracy based on an allegation that Coloian had been involved in a scheme whereby Cianci received a $5,000 payment for obtaining a city job for one Christopher Ise. (*Ibid.* at 1-4.) On June 27, 2002, following a four-day trial at which the district court (Torres, C. J.) denied Coloian's motion for judgment of acquittal at the close of the government's case, a jury acquitted him of both counts. (*Ibid.* at 5.)

On December 8, 2005, over three years later, Coloian filed a "Motion to Expunge" under the original district court case

number. (Addendum at 1.) In that motion, Coloian asked the court to "expunge his record with all due dispatch." (*Ibid.*) In a two-page memorandum of law, Coloian asserted that expungement was warranted on "equitable" grounds. (*Ibid.*) In three sentences, Coloian explained that these equitable grounds consisted of (1) "stigma" that was "unusual and extreme" and (2) unspecified impediments to his "ability to practice law and conduct business." (*Ibid.* at 1- 2.) Coloian filed a related motion to seal and accompanying memorandum of law the same day. (Docket No. 709.)

The government filed a consolidated response in which it questioned the court's jurisdiction and argued that the requested relief was inappropriate in any event. (Docket No. 712.)

In reply, Coloian renewed his stigma assertions and also made vague suggestions of government misconduct (*e.g.*, that unspecified evidence was withheld from the grand jury, that prosecutors had been "over zealous," and that there had been a plot to keep then- U.S. Attorney Margaret E. Curran in power during the trial notwithstanding the change of administration). (Addendum at 5-11.)

At a February 10, 2006 hearing, Coloian conceded that nothing in the record of the criminal proceeding had "disqualif[ied] him for anything that he might apply for in the future." (Tr. 4-5.) Coloian maintained, however, that the record appeared on his credit report and that he was questioned about it by banks, potential clients, and friends. (Tr. 4-5,7.) Coloian also suggested that he was different from other acquitted defendants in that he was a "practicing attorney" and "a member of the business community." (Tr. 8.) Finally, Coloian made brief references to alleged "unusual things" that had occurred during the trial. (Tr. 7.)

The district court (Torres, C.J.) concluded that expungement might be appropriate upon a showing that (1) the proceedings had been unlawful or invalid or (2) the record of the proceeding caused "extreme hardship" in a particular

case. (Tr 13-14.) The court found, however: 'I don't think there's anything even approaching satisfaction of either of those criteria." (Tr. 15.) The court then explained the basis for both findings. (Tr. 15-17.)

III. SUMMARY OF ARGUMENT

1. Based on the Supreme Court's decision in *Kokkonen*, this Court should follow the lead of the Third, Eighth and Ninth circuits and hold that a district court lacks subject-matter jurisdiction to expunge the records of a criminal proceeding based purely on equitable considerations. Two decisions of this Court provide indirect support for this position. Moreover, the circuits that have held otherwise did so prior to Kokkonen or failed to address that decision. They also overlooked the fact that Congress has provided for expungement-related remedies in other areas but not in this one. Whether expressed in jurisdictional terms or in terms of authority, there is no basis for a judge-made cause of action here.

2. In any event, assuming *arguendo* that the district court had the power to grant the requested remedy, its ruling that the facts did not warrant relief was not an abuse of discretion. As the court found, Coloian did not present any extraordinary circumstances that could possibly warrant expunging the records of his case. His proposed exception for white collar defendants finds no support in the case law and is anything but equitable.

IV. ARGUMENT

A. THE DISTRICT COURT LACKED SUBJECT-MATTER JURISDICTION

The threshold jurisdictional issue is reviewed *de novo*. *See Baella-Silva v. Hulsey*, 454 F.3d 5, 10 (1st Cir. 2006).

In a unanimous 1994 decision, the Supreme Court stated that "[f]ederal courts are courts of limited jurisdiction" and that they "possess only that power authorized by Constitution and statute, . . . which is not to be expanded by judicial

decree." *Kokkonen v. Guardian Life Insur. Co.*, 511 U.S. 375, 377 (1994) (citations omitted). It held that ancillary jurisdiction exists to serve two narrow purposes: "(1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent"; and "(2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees." *Id.* at 379-80. The Court viewed claims of "inherent power" as falling under the "the second head of ancillary jurisdiction." *Id.* at 380; *see also Peacock v. Thomas*, 516 U.S. 349, 354 (1996) (reiterating two-factor *Kokkonen* test for ancillary jurisdiction).

Coloian does not point to a specific statutory provision which authorizes expungement. Rather, Coloian filed this action under the original district court case number, and he appears to invoke the district court's ancillary jurisdiction under 18 U.S.C. § 3231. (Defense Brief at 5-8.)

Relying on the principles of *Kokkonen*, the Third, Eighth and Ninth Circuits have held that a district court lacks subject-matter jurisdiction to expunge records of a criminal proceeding based purely on equitable considerations, and they have rejected contrary arguments premised on alleged ancillary jurisdiction under 18 U.S.C. § 3231 and "inherent" power. *See United States v. Rowlands*, 451 F.3d 173, 176-78 (3d Cir. 2006); *United States v. Meyer*, 439 F.3d 855, 856, 859-63 (8th Cir. 2006); *United States v. Dunegan*, 251 F.3d 477, 478-80 (3d Cir. 2001); *United States v. Sumner*, 226 F.3d 1005, 1010-15 (9th Cir. 2000). Rather, if the power to expunge exists at all, it may be exercised only in cases where the defendant establishes that the original proceeding or conviction was somehow invalid or unlawful. *Id.* The same result follows where the original proceeding in question resulted in an acquittal. *See Dunegan*, 251 F.3d at 478-80; *United States v. Gary*, 206 F. Supp.2d 741, 741 (D. Md. 2002). Like the defendant in *Dunegan*, Coloian filed the instant action "in the same court and under the same docket number

as his original criminal prosecution." *Dunegan*, 251 F.3d at 478 n.1.[1]

This Court has not specifically addressed the jurisdictional question that these three circuits have resolved against Coloian. In a pre-*Kokkonen* decision not cited by Coloian, the Court appeared to assume in passing that courts are empowered to order expungement, but it noted that the power was a "narrow one" and that it "has been used more often to expunge records of unconstitutional convictions." *Reves v. Supervisor of Drug Enforcement Admin.*, 834 F.2d 1093, 1098 (1st Cir. 1987) .

The circuit court decisions that have expressly found ancillary jurisdiction or inherent authority to order expungement based on equitable considerations have either predated *Kokkonen* or failed to address that decision. *See, e.g.*, *United States v. Flowers*, 389 F.3d 737, 738-41 (7th Cir. 2004); *United States v. Janik*, 10 F.3d 470, 472 (7th Cir. 1993); *United States v. Friesen*, 853 F.2d 816, 817 (10th Cir. 1988); *Livingston v. U.S. Dep't Justice*, 759 F.2d 74, 78-79 (D.C. Cir. 1985); *Allen v. Webster*, 742 F.2d 153, 154-55 (4th Cir. 1984); *United States v. Schnitzer*, 567 F.2d 536, 539-40 (2d Cir. 1977); *see also Natwig v. Webster*, 562 F. Supp. 225, 227-32 (D. R.I. 1983).

These decisions have also tended to overlook the fact that Congress itself has provided for expungement or related remedies only in certain narrowly defined circumstances. 5 U.S.C. §§ 552a(d) and 552a(g) (1) (C) (allowing claims to amend public records that are inaccurate); 10 U.S.C. § 1565 (e) (DNA records shall be expunged when military conviction is overturned); 18 U.S.C. § 3607 (allowing for expungement of criminal records in certain drug possession cases); 21 U. S.C.

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[1] The government assumes, for purposes of argument only, that a court might have expungement power in the narrow circumstance of an unlawful or invalid proceeding.

§ 844a(j) (allowing for expungement of civil penalty records in certain drug possession cases); 42 U.S.C. § 14132 (d) (DNA records held by FBI shall be expunged in certain cases where conviction is overturned); *Sumner*, 226 F.3d at 1012 (listing examples); *cf. Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 121-22 (1983) (noting, wide variety of state expungement statutes.)

In the present case, there was nothing that even approached a claim that the proceedings were invalid or unlawful. (Tr. 15.) The new allegation on appeal to the effect that a trial and grand jury witness had credibility problems—a claim unsupported by record citations—falls well short of meeting the test even if it is assumed to be true. (Defense Brief at 10.) In the absence of a colorable claim that the earlier proceedings were invalid or unlawful, the district court lacked subject-matter jurisdiction to order that the records of the proceeding be expunged.[2]

Oddly, Coloian appears to concede the point, though perhaps unintentionally: "A district court may have ancillary jurisdiction to expunge criminal records in extraordinary cases to preserve its ability to function successfully by enabling it to correct an injustice caused by an illegal or invalid criminal proceeding. That ancillary jurisdiction does not extend to expungement of a criminal conviction where the

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[2] While it may be tempting to assume hypothetical subject-matter jurisdiction and address the underlying equities of Coloian's claim, the Supreme Court has banned that practice, *see Steel Co. v. Citizens for a Better Env't*, 523 U.S. 95, 101 (1998), at least where Article III is implicated, *see McBee v. Delica Co.*, 417 F.3d 107, 127 (1st Cir. 2005), and apparently with that admonition in mind two of the above circuit court decisions cited Steel Co. when they held that there is no ancillary jurisdiction to expunge a criminal record based purely on equitable considerations, *see Meyer*, 439 F.3d at 858; *Sumner*, 226 F.3d at 1014.

petitioner asserts solely equitable grounds." (Defense Brief at 7-8.)[3]

Coloian faces a separate problem that he fails to address on appeal. To the extent that Coloian seeks to expunge not just judicial records but also executive branch records, courts have taken an even dimmer view of such requested relief, suggesting that it is never available under any circumstances. *See Meyer*, 439 F.3d at 862; *Flowers*, 389 F.3d at 738-39; *United States v. Crowell*, 374 F.3d 790, 796 n.6 (9th Cir. 2004), *cert. denied*, 543 U.S. 1070 (2005); *Sumner*, 226 F.3d at 1014 n.13; *Janik*, 10 F.3d at 471-72; *Scruggs v. United States*, 929 F.2d 305, 305-07 (7th Cir. 1991). Not only would an order to destroy executive branch records present Separation of Powers concerns, but Congress has specifically provided by statute that the government shall maintain such records. 28 U.S.C. § 534; *Meyer*, 439 F.3d at 862; *Flowers*, 389 F.3d at 738-39; *Crowell*, 374 F.3d at 796 n.6; *Scruggs*, 929 F.2d at 306. When the expungement theory is extended to executive branch records it pits a non-existent right against an explicit congressional directive. *But cf. Reyes*, 834 F.2d at 1098 (appearing to assume that court has power to order expungement of executive branch criminal files).

Even in the case of judicial records, Coloian's theory raises more questions than it answers, as the district court observed. (Tr. 15.) Is there any time limitation on actions for expungement? In cases where relief is deemed appropriate, would the court have to destroy all records referring to the defendant, or redact all references to the defendant from

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[3] Coloian has not argued that jurisdiction exists under the All Writs Act, 28 U.S.C. § 1651, and the Third Circuit has explained why that contention would be meritless. *Rowlands*, 451 F.3d at 178-79; *cf. United States v. Sawyer*, 239 F.3d 31, 36-38, 49 (1st Cir. 2001) (assuming without deciding that a writ of coram nobis under All Writs Act "is available to vacate a criminal conviction premised upon a fundamental error of law," but reversing district court order which had granted that writ and ordered expungement of record).

individual documents? Would it be enough to seal the case file and docket sheet? Although Coloian fails to notice it, the implications extend to the present appeal. If Coloian is right, must this Court seal or destroy the very briefs filed in this appeal? Must it issue a decision in Coloian's case and then promptly seal or destroy it? There are even post-appeal consequences: would the government have to destroy all of its files concerning Coloian or would it be forbidden from referring to those files in any future investigation of him?

Under the best of circumstances, expungement is an inherently problematic exercise involving the 'judicial editing of history.' *Rowlands*, 451 F.3d at 176 (quoting *Rogers v. Slaughter*, 469 F.2d 1084, 1085 (5th Cir. 1972) (per curiam)). Moreover, as this Court once noted in holding that a certain federal statute (which has since been repealed) did not authorize expungement or destruction of the records of a criminal proceeding, "[s]uch destruction has an Orwellian flavor which we find unpalatable in 1984 and which we are confident Congress did not enact into law in 1950." *United States v. Doe*, 732 F.2d 229, 231 (1st Cir. 1984). The strange consequences of Coloian's position provide further support for a rule which narrowly circumscribes a district court's power to entertain such claims for relief in the first place, if they may be entertained at all. If Congress wishes otherwise, it can say so.

While the Court has not decided the precise question presented here, it has resolved two analogous issues against defendants. *See, e.g.*, *United States v. Angiulo*, 57 F.3d 38, 40-42 (1st Cir. 1995) (district court lacked jurisdiction under Fed. R. Crim. P. 32 to grant post-sentencing motion to expunge certain references in presentence report); *Doe*, 732 F.2d at 230-32 (holding that although defendant's convictions were set aside under the former Federal youth Corrections Act, the Act did not authorize the expungement of the records of the criminal proceeding itself, and that it was "the province of Congress, not the courts, to amend the statute").

Finally, Coloian's reliance on *Prou v. United States*, 199 F.3d 37 (1st Cir. 1999) is unavailing. In *Prou*, this Court held that in imposing a statutorily-enhanced sentence despite an untimely government notice, the district court had exceeded its authority. *Id.* at 45-46. The Court reasoned, however, that the fact that the district court had lacked power to take this action did not mean that it had been without subject-matter jurisdiction over the criminal case at the time of the error; such jurisdiction plainly existed under 18 U.S.C. § 3231. *Id.* at 45. The Court observed: "Once subject-matter jurisdiction has properly attached, courts may exceed their authority or otherwise err without loss of jurisdiction." *Id.*

Prou is easily distinguished. The contested judicial action in Prou took place at a sentencing, during the final phase of an ongoing criminal case. That is why there was still subject-matter jurisdiction under § 3231. Here, there is no question that such jurisdiction "properly attached" with the filing of the charges against Coloian. The problem for Coloian is that the criminal proceeding concluded long ago. Prou cannot be read as holding that § 3231 jurisdiction lasts indefinitely, regardless of acquittal. An acquittal ordinarily marks the end of the criminal proceeding. *See United States v. Scott*, 437 U.S. 82, 91 (1978) ("A judgment of acquittal, whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, may not be appealed and terminates the prosecution when a second trial would be necessitated by a reversal"). Moreover, even in the case of conviction, a district court's power to revisit the case post-sentencing is narrowly confined.[4] Thus, Coloian's Prou-based position merely begs the question of whether

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[4] *See* 18 U.S.C. § 3562 (b) ; 18 U.S.C. § 3582 (c); 18 U.S.C. § 3583(e)(2); 28 U.S.C. § 2255; Fed. R. Crim. P. 32.1; Fed. R. Crim. P. 32.2; Fed. R. Crim. P. 33; Fed. R. Crim. P. 34; Fed. R. Crim. P. 35; Fed. R. Crim. P. 36; Fed. R. Crim. P. 37; Fed. R. Crim. P. 38; *United States v. Maldonado*, 242 F.3d 1, 3 (1st Cir. 2001).

ancillary jurisdiction may be found under § 3231 in these circumstances—a question that three circuits have resolved against him.

In any event, whether this case involves the power of a court "to entertain a cause of action," *Prou*, 199 F.3d at 45, thus implicating subject-matter jurisdiction, as three circuits have apparently concluded, or merely the power of a court "to issue a specific type of remedy," *id.*, in a case where there is general subject-matter jurisdiction, the result is the same. This is so because no such specific remedial power exists here even assuming that a court's subject-matter jurisdiction under § 3231 is essentially limitless.

B. THERE WAS NO ABUSE OF DISCRETION IN ANY EVENT

The district court decided that it did have the power to order expungement on an equitable basis upon a showing of "very unjust and extreme hardship on the individual seeking expungement." (Tr. 14-15.) It ultimately concluded, however, that there was nothing which even approached that standard in this case. (Tr. 14-15.)

Assuming arguendo that subject-matter jurisdiction existed, and assuming further that the district court was empowered to grant expungement on an equitable basis, Coloian presented no facts that could have warranted expungement, whether under the standard adopted by the court or more charitable standards that might be found in the case law. As Coloian properly concedes (Defense Brief at 15), the district court's weighing of the equities should be reviewed for an abuse of discretion. *See Flowers*, 389 F. 3d at 740.

Even in circuits where expungement may be entertained on an equitable basis, "expungement is an extraordinary remedy," "the balance very rarely tips in favor of expungement," and there "must be uniquely significant" unwarranted and adverse consequences "in order to outweigh the strong public interest in maintaining accurate and undoctored records." *Flowers*, 389 F.3d at 739; *see also Allen*,

742 F.2d at 155 (arrest record expungement of acquitted defendant appropriate only in "extraordinary circumstances"); *Schnitzer*, 567 F.2d at 539 (expungement available only in "extreme circumstance").

As stated, Coloian conceded below that nothing in the record of the criminal proceeding had "disqualif[ied" him for anything that he might apply for in the future" (Tr. 4-5.) Coloian did maintain that the record appeared on his credit report and that he was questioned about it by banks, potential clients, and friends (Tr. 4-5,7), but these are problems that many acquitted defendants face. There is nothing extraordinary in those circumstances.

Coloian also suggested that he is different from other acquitted defendants in that he is a "practicing attorney" and "a member of the business community" (Tr . 8), and on appeal he now emphasizes that the charged crimes carried implications of dishonesty (Defense Brief at 11, 13, 15-17). Under this theory, however, most white collar defendants would be entitled to expungement following an acquittal. It goes without saying that many blue collar defendants (notably drug defendants) face similar problems after acquittal, including questions from family members, friends, potential employers, and banks. They may not be attorneys or members of the "business community," but there is no principled basis to deny them the same relief. And if that is so then expungement would essentially become a matter of right notwithstanding the lack of any statutory basis for such a right. Moreover, in arguing that the district court abused its discretion because it "should have considered the nature of the charges as a factor in determining whether there may be an unusual or extreme hardship" and focused on the implications of dishonesty (Defense Brief at 15-16), Coloian neglects to mention that he never addressed this factor below, whether orally or in writing. Finally, even if all judicial and executive branch records of Coloian's case were obliterated, it is not even clear that this would enable Coloian to answer "no" when asked whether he has ever been charged with a crime.

A review of the circuit court decisions that have engaged in equity balancing fails to disclose a single case that supports the current claim for relief. *See, e.g.*, *Geary v. United States*, 901 F.2d 679, 680 (8th Cir. 1990) (denial of expungement upheld where acquitted defendant "made a series of nonspecific assertions such as that the arrest was not based on probable cause, that it was for the purpose of harassment, and that the existence of records concerning his arrest and trial ha[d] caused him embarrassment and ha [d] impinged on his ability to earn 'a substantial livelihood')" ; *Friesen*, 853 F.2d at 817-18 (expungement order reversed where attorney was acquitted on all counts in drug case); *Schnitzer*, 567 F.2d at 539-40 (expungement not warranted even where indictment was dismissed); *United States v. Linn*, 513 F. 2d 925, 927-28 (10th Cir. 1975) (acquittal of attorney on fraud charges did not warrant expungement) .

As the government pointed out below (Tr. 10), the harms identified by Coloian have less to do with the fact that there are files concerning the criminal proceeding and more to do with the fact that the case was highly publicized—a fact that no court can change. It impossible to erase the charges from the historical record; no destruction of files will accomplish that. Moreover, as the district court indicated (Tr. 16), the judicial records are actually helpful to Coloian in that they reflect his acquittal on those charges. Ironically, the instant district court action and the present appeal only call further attention to Coloian's case (but perhaps that is the point).[5]

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[5] Although not noted by the district court, putting aside the government's interest in preserving its own files, there is a broader *public* interest in the records of criminal proceedings. *See In Re Providence Journal Company*, 293 F.3d 1 (1st Cir. 2002).

V. CONCLUSION

For the above reasons, this Court should either dismiss the appeal or affirm.

Respectfully submitted,

UNITED STATES OF AMERICA,
By its Attorneys,

ROBERT CLARK CORRENTE
United States Attorney

DONALD C. LOCKHART
Bar No. 62470
TERRENCE DONNELLEY
Assistant United States Attorneys

ADDENDUM TO BRIEF ON APPEAL FOR APPELLEE UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

United States of America	:	
Vs.	:	C.A. # 1:00-cr-00083-T-3
Artin Coloian,	:	
Defendant	:	

MOTION TO EXPUNGE

Now comes the Defendant, Artin Coloian, by and through his attorney and hereby moves that this Honorable Court expunge his record in the above case.

In support of said Motion, Defendant hereby attaches a Memorandum of Law.

WHEREFORE, Artin Coloian prays that this Honorable Court will grant his motion and expunge his record with all due dispatch.

Respectfully submitted,
ARTIN COLOIAN
By His Attorney,

/s/ Steven D. DiLibero
STEVEN D. DILIBERO #4678
130 Dorrance Street
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(401) 621-9700

NOTICE

Please take notice that the within Motion shall be called for hearing on the ___ day of _____, 2005, at 9:30 a.m., or as soon thereafter as counsel my be heard.

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

United States of America	:	
Vs.	:	C.A. # 1:00-cr-00083- T-3
Artin Coloian,	:	
Defendant	:	
	:	

ARTIN COLOIAN'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION TO EXPUNGE

Facts

On June 27, 2002, a jury found Mr.Coloian not guilty in the above case, and this Honorable Court entered this judgment of 'not guilty' on July 1, 2002. Today, Mr. Coloian asks this Honorable Court to expunge his record.

This Honorable Court has the power to grant Mr.Coloian's request. Although not routinely granted, courts have held that in special cases warranting equitable relief, a motion to expunge can, and should, be granted. Courts have focused on the undeserved and undesirable consequences of police and court procedures as a reason to give relief to a defendant. *United States v. Smith*, 745 F. Supp. 1553; *Natwig v. Webster*, 562 F. Supp. 225.

Argument

Mr. Coloian still lives with the pronounced stigma of his case despite exoneration. His former positions in local government and the public eye magnify the effects of his case so much so that they can only be characterized as unusual and extreme. His record impedes his ability to practice law and conduct business to an untenable degree that can only be properly rectified by the expungement of his record.

WHEREFORE, Artin Coloian, prays that this Honorable Court will expunge his record

Respectfully submitted,
ARTIN COLOIAN
By His Attorney,

/s/ Steven D. DiLibero

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UNITED STATES OF AMERICA
DISTRICT OF RHODE ISLAND

United States of America	:	
	:	
Vs.	:	C.A. # 1:00-cr-00083- T-3
	:	
Artin Coloian,	:	
Defendant	:	

DEFENDANT ARTIN COLOIAN'S
REPLY TO
GOVERNMENT'S MEMORANDUM OF LAW
IN SUPPORT OF ITS CONSOLIDATED RESPONSE

Background

The Defendant filed with this court a Motion to Expunge and a Motion to Seal in regards to the above case along with separate, supporting memoranda. The Government subsequently filed a consolidated response objecting to the Defendant's motions and attached a memorandum of law in support of its response. Oral arguments on the motions are set to be heard on February 10, 2006.

The Defendant believes it immaterial whether the two motions are heard separately or together. Since the Government has consolidated its response, the Defendant will assume there is no objection to consolidating the motions, and that they be considered in the alternative. Therefore, for purposes of this reply memorandum, the Defendant will consider the motions as one in the interest of clarity and judicial economy.

District Court Jurisdiction Exists

The Government in its responsive memorandum asserts that District Courts do not possess subject-matter jurisdiction to expunge judicial records.

To the contrary, the Third, Seventh, Ninth, and Tenth Circuits as well as the District of Columbia, have held that they do have such power. *United States v. Dunegan*, 251 F.3d 477 (3rd Cir. 2001); *United States v. Flowers*, 389 F.3d 737; *United States v. Sumner*, 226 F.3d 1005 (9th Cir. 2000); *United States v Friesen*, 853 F.2d 816 (10th Cir. 1988); *Livingston v. U.S. Dep't of Justice*, 759 F.2d 74 (D.C. Cir. 1985).

The Defendant, like the Government, is unaware of any First Circuit authority on this point of law. However, this District Court has held that it does have the power to expunge. *Natwig v. Webster*, 562 F. Supp. 225.

Therefore, it is appropriate for this Court to hear and determine the Defendant's motions in this case.

The Defendant's Record Should Be Expunged and/or Sealed

The courts have outlined several different approaches courts have taken when determining an issue of this nature. These approaches focus on facts of the case, the nature of the wrong or wrongs averred by the Defendant, and the counterbalance of a law enforcement interest in accurate records.

In the Third and Ninth Circuits one would have to be the victim of "invalid or unlawful" criminal proceedings in order to have his or her motion to expunge and/or seal heard and granted. In the Tenth Circuit a defendant's case must show "extraordinary circumstances" to succeed. *See United States v. Dunegan*, 251 F.3d 477, *United States v. Friesen*, 853 F.2d 816. The Seventh Circuit proffers a balancing test in which weighs the "dangers of unwarranted adverse consequences to

the individual" against the "public interest in maintenance of the records." *United States v. Flowers*, 389 F.3d at 739.

In the District of Columbia and the District of Rhode Island, while the granting of such a motion is not automatic, a defendant merely needs something more than an acquittal. *See Livingston v. U.S. Dep't of Justice*, 759 F.2d 674; *Natwig v. Webster*, 562 F. Supp. 225.

More precisely, in *Natwig*, this Court specified its guiding principles when it held that:

> *[T]he power to expunge an arrest record is a narrow one, and should not be routinely used wherever a criminal prosecution ends in an acquittal, but should be reserved for the unusual or extreme case...*
>
> *In deciding what constitutes "the unusual or extreme case" justifying expunction courts have balanced the government's need for the arrest record against the harm to the person arrested that results from maintaining records.*
>
> *There appears to be no definite all purpose rule governing this determination and to a considerable degree each case must stand on its own two feet.*

Narwig, 562 F. Supp. at 228 (quoting *United States v. Linn*, 513 F.2d 925; *Doe v. Webster*, 606 F.2d 1231; *United States v. Schnitzer*, 567 F.2d 536; *Paton v. LaPrade*, 524 F.2d 862; *Diamond v. United States*, 649 F.2d 496).

This case is, at the very least, unusual and extreme and not merely one of acquittal. The Defendant here was originally indicted along with multiple other defendants in a twenty-nine count indictment wherein he was the sole Defendant named in Counts Ten and Eleven and not mentioned at all in the other twenty-seven counts. During the course of the grand jury proceeding, a juror complained that the Government was uncooperative with the Grand Jury and asserting that the prosecution was withholding material information on the case. It is not inconceivable that this information may have

supported or even terminated the Defendant's case prior to indictment. Nevertheless, the Government proceeded undeterred.

The Defendant brought a motion to sever before the court based upon this prejudicial joinder to vindicate this violation of due process. The court agreed, granting the motion. Thereafter the counts against the Defendant contained in the original indictment were severed, and Mr. Coloian was tried separately. This court, in granting the motion stated that there was a "heightened risk" that evidence presented against other defendants could prejudice Mr. Coloian and he appeared the least culpable of all the defendants.

The Government's assertion in its responsive memorandum that Mr. Coloian was "validly indicted" overlooks these facts.

Later the Government's lead prosecutor, who was linked to the suggested misconduct outlined above, was exiguously fined and suspended from the bar after he, in violation of the court's express order, when he reduced the responsibility of his public office by showing an evidentiary video as a parlor game to guests at a house party he hosted during the course of the court case. Nevertheless, the Government proceeded undeterred.

After the election of George W. Bush to the presidency, during the pendency of the case, the centuries old traditional resignation of the United States Attorney of this district was held in abeyance in order to provide continuity in the prosecution of the original case. Such was the Government's zeal to obtain convictions against the primary defendant, Vincent Cianci, an individual whom the Government, by its own public statements, had investigated for the better part of twenty years.

After his trial, the Defendant was acquitted by the jury.

Now the Defendant seeks to avoid the continuing stigma of the prosecution brought against him by an over zealous

government prosecution by an expunction and/or sealing of his record. The stigma remains and is encountered on every occasion when the Defendant, now an attorney in private practice, a profession where character and reputation are the foundation of credibility and effective representation of clients, appears before a court. This stigma is latent and not subject to quantification. As well, in several specific instances the Defendant has been required to explain the circumstances of his prosecution and acquittal, the legal niceties of which escape those untrained in law.

The Government, undeterred, nevertheless objects.

They emphasize their interest in maintaining records citing *Flowers*, *supra*. *Flowers* is not applicable to Mr. Coloian's case. The case involved a conviction and no issues of Government misconduct. Mr. Coloian was acquitted. He was acquitted in the face of exceptional and unusual prosecutorial zeal. In *Flowers*, the Government illustrated, "Records relating to a person's criminal conduct are vital tools to law enforcement and are, at least as of today, essential to the computation of sentences..." 389 F.3d at 739. The jury decided that this Defendant had engaged in no criminal conduct. Thus, the absence of a record, if this court should grant his motion, could not intefere or impede the computation of any sentence. He had no criminal record when he was initially indicted and remains untainted by such now.

The government asserts that this Defendant enjoys a flourishing law practice and successful restaurant. By whose standard and by what authority does the government use to make such a naked assertion? Is a prosecutor using his or her own standard?

Indeed, when Mr. Coloian filed the instant motions, the local daily newspaper received information regarding the filing and published a story on the front page of the "Statewide" section. This information was supplied neither by Mr. Coloian nor his counsel. The story wrongfully created

an impression that Mr. Coloian and other the individuals were either convicted or felons. His motion had not been heard, much less decided, before the public were given the distinct impression that Mr. Coloian was somehow guilty along with the others. This case, from the beginning, has received local and national publicity.

The Court should take the last step and expunge and/or seal this Defendant's record to finally exonerate him. "[i]n a fundamental way expungement in this case protects what Justice Brandeis termed the 'right to be let alone – the most comprehensive of rights and right most value by civilized men." *Natwig*, 562 F. Supp. at 231.

WHEREFORE, the Defendant, Artin Coloian, prays that this Honorable Court grant his motion(s) and expunge and/or seal his record

Respectfully submitted,
ARTIN COLOIAN
By His Attorney,

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UNITED STATES OF AMERICA
DISTRICT OF RHODE ISLAND

United States of America	:	
	:	
Vs.	:	C.A. # 1:00-cr-00083- T-3
	:	
Artin Coloian	:	
Defendant	:	

GOVERNMENT'S MEMORANDUM OF LAW IN SUPPORT OF ITS CONSOLIDATED RESPONSE TO DEFENDANT COLOIAN'S MOTIONS TO EXPUNGE AND SEAL

Defendant Artin Coloian has moved this court to both seal and expunge his record in the above entitled matter.[1] The government objects. First, the District Courts do not possess subject-matter jurisdiction to expunge judicial records. Even assuming that the Court possesses the inherent authority to expunge records, expungement is limited to extraordinary circumstances. Here, the defendant, in his one-and-a-half page Memorandum, makes no effort to describe to the Court why he would be entitled to such extraordinary relief.

[1] The government presumes that the defendant filed his two motions in the alternative. Further, the defendant has moved to expunge and/or seal "his record" without further elaboration as to what "record" he is precisely seeking to expunge or seal. The government therefore presumes that he means any and all judicial records connected to the case, including the indictment, pleadings, exhibits, and transcripts of public court proceedings.

1. The District Court's Power to Expunge. In his Memorandum, the defendant states that this Court has the power to grant an expungement. The defendant cites no statute, rule, or constitutional provision upon which this power is based. The government is not aware of any, nor of any authority on this matter from the First Circuit.

It goes without saying that federal courts are courts of limited jurisdiction. "[T]hey possess only that power authorized by the Constitution and statutes, which is not to be expanded by judicial decree." *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994) (citations omitted). Based on this doctrine, both the Third and Ninth Circuits have held that – absent a showing that criminal proceedings were invalid or unlawful – the district courts do not have subject matter jurisdiction to hear motions to expunge such as that filed by the defendant here. *United States v. Dunegan*, 251 F.3d 477 (3rd Cir. 2001) (rejecting inherent powers and ancillary jurisdiction as jurisdictional bases); *United States v. Sumner*, 226 F.3d 1005 (9th Cir. 2000). In *Sumner*, the court noted that:

> Sumner has not cited, nor has our research disclosed, any statute in which Congress has empowered a district court to reopen a criminal case after its judgment has become final for the purpose of expunging a record of a valid arrest or conviction to enhance a defendant's employment opportunities. We hold that a district court does not have ancillary jurisdiction in a criminal case to expunge an arrest or conviction record where the sole basis alleged by the defendant is that he or she seeks equitable relief. The power to expunge a record of a valid arrest and conviction on equitable grounds must be declared by Congress. The

> Constitution prohibits federal courts from expanding their own subject matter jurisdiction.

226 F.3d at 1015.[2]

Other Circuits have found that the district courts possess an equitable or inherent authority to expunge records. *See, e.g., United States v. Flowers*, 389 F.3d 737 (7th Cir. 2004). However, these courts have found that expungement should be reserved for "extraordinary circumstances," even in cases where the defendant has been acquitted or had his case dismissed. *United States v. Friesen*, 853 F.3d 816 (10th Cir. 1988) (attorney acquitted of narcotics trafficking charges not automatically entitled to expungement); *Livington v. U.S. Dep't of Justice*, 759 F.2d 74, 78 n.30 (D.C. Cir. 1985) (acquittal does not justify expungement). The case cited by defendant, *Natwig v. Webster*, 562 F.2d 225 (D.R.I. 1983), also states that "it would appear that an acquittal, standing alone, is not sufficient to warrant an expunction of an arrest record." *Id.* at 228. It should also be noted that, even assuming the validity of the *Natwig* reasoning, Judge Pettine was motivated to grant the motion in part because the grand jury returned a no true bill. *Id.* at 230. Such is not the case here, where the defendant was validly indicted, tried on such, and acquitted only after several hours of deliberation by the jury.

---

[2] The defendant cites *United States v. Smith*, 745 F. Supp. 1553 (C.D. Cal. 1990) as authority for his proposition that the district courts have expungement power. That case was reversed. The Ninth Circuit vacated *Smith*, finding that, in the absence of any illegality in the original proceeding, the court could not exercise an expungement power simply to assist the defendant in reenlisting in the military. *United States v. Smith*, 940 F.2d 395 (9th Cir. 1991). In *Smith* the Court of Appeals presumed that the district court had the power to expunge the matter. *Id.* at 396. Later, the *Sumner* court held that, absent an illegality in the original case, a district court did not possess ancillary jurisdiction to expunge records based solely on equitable considerations. 226 F.3d at 1014.

In *Flowers*, the court prescribed a balancing test, weighing the "dangers of unwarranted adverse consequences to the individual" against the "public interest in maintenance of the records." 389 F.3d at 739. The Seventh Circuit noted, however, that "[a]lthough we have adopted a balancing test, it seems clear that the balance very rarely tips in favor of expungement." *Id.* This is so because expungement is an "extraordinary remedy"; therefore, "'unwarranted adverse consequences' must be uniquely significant in order to outweight the strong public interest in maintaining accurate and undoctored records." *Id.* As to the government's interest in maintaining accurate records, the court aptly stated.

> [t]hat interest is strong as evidenced by the statutory admonition found in 28 U.S.C. § 534 which requires the Department of Justice to collect criminal records and make them available to state and local law enforcement agencies. Records relating to a person's criminal conduct are vital tools to law enforcement and are, at least as of today, essential to the computation of sentences under the United States Sentencing Guidelines. Other Evidence of the weight of the public interest can be seen in the long tradition of open proceedings and public records, which is the essence of a democratic society.
>
> To outweigh that interest "unwarranted adverse consequences" must truly be extraordinary. The phrase does not refer to adverse consequences which attend every arrest and conviction. Those are unfortunate but generally not considered unwarranted adverse consequences. It is possible, even likely, that any person with

> an arrest or conviction record may well be impeded in finding employment.

Id.

Here, the defendant has not even attempted to present the "extraordinary" circumstances which the courts have states are a necessary threshold to even contemplate expungement. He simply recites vague assertions that the effects of his case are "unusual and extreme." He states that his record "impedes his ability to practice law and conduct business." He does not specify how this Court's records have achieved this, nor does he clarify the damage done when, on information and belief, he appears to have a healthy law practice as well as an ongoing restaurant business.

For all of these reasons, the government respectfully requests that the defendant's Motion to Seal and Motion to Expunge be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 07-72

In the Supreme Court of the United States

ARTIN H. COLOIAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court had jurisdiction to entertain petitioner's request for expungement of records relating to petitioner's criminal prosecution.

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In the Supreme Court of the United States

No. 07-72

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 480 F.3d 47.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 2007. On June 7, 2007, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including July 18, 2007, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In June 2002, after a jury trial in the United States District Court for the District of Rhode Island, petitioner was acquitted of conspiring to commit bribery (18 U.S.C. 371) and the substantive offense of bribery (18

U.S.C. 666(a)(1)(B)). In December 2005, petitioner filed a motion to expunge the record of his criminal case. See Pet. App. 2a, 59a-61a. The district court concluded that it had jurisdiction, but rejected the motion on the merits. See *id.* at 25a-36a. The court of appeals concluded that the district court lacked jurisdiction, and it vacated the district court's order, remanding with instructions to dismiss for want of jurisdiction. *Id.* at 1a-9a.

1. Petitioner and five co-defendants were indicted on federal corruption charges. On petitioner's motion, the district court severed his case from that of his co-defendants. In June 2002, the jury found petitioner not guilty on both of the counts with which he was charged. Pet. App. 1a-2a, 45a.

In December 2005, petitioner filed a motion to expunge the record of his criminal case, using the docket number of the original prosecution. Pet. App. 59a-61a; see *id.* at 2a, 45a-46a. He argued that expungement was warranted on equitable grounds because he suffered an "extreme and unusual" "stigma" from the prosecution and was impeded in his ability to practice law and conduct business. *Id.* at 2a, 46a. At a hearing in the district court, petitioner's counsel argued:

> Although [petitioner] has been exonerated and cleared, he still faces the stigma which hovers over him, and at any time in the future, the cloud of prosecution against him remains for whomever, or by one way or another, they may gain access to that record. 28 United States Code 534 allows the Attorney General to disseminate, collect, and record records from not only state proceedings, but also various agencies, and they're collected through that statute, and the Attorney General's allowed to disseminate them to various agencies. And those agencies are not just

> law enforcement agencies. They're banks, credit agencies, professional employment insurance companies. And also the information is given out when a person applies and is running for public office, that information is sent back to those people who are applying.

Id. at 27a. The government opposed the motion to expunge, arguing that the district court lacked jurisdiction to entertain it and that expungement was in any event inappropriate. See *id.* at 2a.

The district court determined that it had authority to order expungement of records in appropriate circumstances, but that such "power should be very sparingly exercised." Pet. App. 33a; see *id.* at 3a. While suggesting that expungement might be appropriate if the underlying criminal proceedings had been unconstitutional or otherwise invalid, or if maintenance of the records would cause "extreme hardship" in a particular case, the court held that petitioner could not satisfy either of those criteria. *Id.* at 33a-34a. The court found "nothing that suggests that the charges against [petitioner] were unlawful or unconstitutional or that there was anything about the Grand Jury's proceedings that could be categorized as such." *Id.* at 34a. The court also observed that the record of the criminal proceedings "includes not only the fact that [petitioner] was indicted and charged, but also that a Jury acquitted him." *Ibid.* In the district court's view, that fact "mitigate[d] * * * any argument that [petitioner] suffers some unusual or extreme hardship as a result of this record being in the Court file." *Ibid.*

2. On petitioner's appeal, the court of appeals vacated the district court's order and remanded the case with instructions to dismiss for lack of jurisdiction. Pet. App. 1a-9a.

In contending on appeal that expungement of his criminal record was appropriate, petitioner argued that the Attorney General's dissemination of information collected pursuant to 28 U.S.C. 534 "may impose a tremendous hardship on an individual." Pet. App. 19a. The court of appeals recognized that in some circumstances a district court "may assert ancillary jurisdiction 'to adjudicate claims and proceedings related to a claim that is properly before the court.'" *Id.* at 5a (quoting *Black's Law Dictionary* 868 (8th ed. 2004)). The court explained, however, that, under this Court's decision in *Kokkonen* v. *Guardian Life Insurance Co. of America*, 511 U.S. 375 (1994), ancillary jurisdiction may appropriately be exercised only (1) to permit a single court to dispose of claims that are factually interdependent; or (2) to enable a court "to manage its proceedings, vindicate its authority, and effectuate its decrees." Pet. App. 5a-6a (quoting *Kokkonen*, 511 U.S. at 380).

The court of appeals explained that "[t]he Third, Eighth and Ninth Circuits have read *Kokkonen* to preclude ancillary jurisdiction over orders to expunge criminal records based solely on equitable grounds." Pet. App. 7a (citing *United States* v. *Meyer*, 439 F.3d 855, 859-860 (8th Cir. 2006); *United States* v. *Dunegan*, 251 F.3d 477, 479 (3d Cir. 2001); and *United States* v. *Sumner*, 226 F.3d 1005, 1014 (9th Cir. 2000)). The court acknowledged that other circuits had "concluded that district courts do have ancillary jurisdiction to expunge records based on equitable considerations." *Id.* at 8a (citing *Livingston* v. *United States Dep't of Justice*, 759 F.2d 74, 78 (D.C. Cir. 1985), as amended Apr. 5, 1985; *United States* v. *Schnitzer*, 567 F.2d 536, 539 (2d Cir. 1977), cert. denied, 435 U.S. 907 (1978); *United States* v. *Flowers*, 389 F.3d 737, 739 (7th Cir. 2004); and *United*

States v. *Linn*, 513 F.2d 925, 927 (10th Cir.), cert. denied, 423 U.S. 836 (1975)). The court observed, however, that the decisions authorizing expungement on equitable grounds "either predate *Kokkonen* or they fail to address that decision, which raises questions as to their continued viability." *Ibid.*

The court of appeals concluded that *Kokkonen* was controlling, and that this Court's decision in that case mandated dismissal for lack of jurisdiction of petitioner's request for expungement of his criminal record. Pet. App. 8a-9a. The court of appeals explained that, "[a]s in *Kokkonen*, the original claims brought before the district court in this case have nothing to do with the equitable grounds upon which [petitioner] seeks the expungement of his criminal record." *Ibid.* The court also observed that, again as in *Kokkonen*, "the power asked for here is quite remote from what courts *require* in order to perform their functions." *Id.* at 9a (quoting *Kokkonen*, 511 U.S. at 380). The court further explained that "[t]he existence and availability of [petitioner's] criminal records do not frustrate or defeat his acquittal. In fact, the records are entirely consistent with and respectful of the jury's ultimate judgment in [petitioner's] case, as they accurately document his arrest, trial and acquittal." *Ibid.*

ARGUMENT

1. Petitioner seeks review of the question "[w]hether a federal district court has inherent or ancillary jurisdiction to expunge *judicial* criminal records based on equitable considerations." Pet. i (emphasis added). In arguing that district courts may appropriately exercise jurisdiction in these circumstances, petitioner frames the

relevant issue as whether a federal court may exercise control over "its own records." See Pet. 16, 20.

In the courts below, however, petitioner's request for expungement of his "record" (Pet. App. 59a) was not limited to records in the custody of the Judicial Branch. To the contrary, in both the district court and the court of appeals, petitioner focused almost exclusively on the *Attorney General's* collection and dissemination of records pursuant to 28 U.S.C. 534, and on the harm to petitioner's reputation and professional standing that the Attorney General's implementation of that statute was alleged to have caused. See Pet. App. 27a (transcript of district court oral argument on petitioner's motion to expunge); *id.* at 19a (court of appeals brief for petitioner); pp. 2-3, 4, *supra*. Petitioner did not contend, let alone identify any sound basis for concluding, that expungement of the district court's *own* records would effectively redress his alleged injuries if the relevant Executive Branch practices remained unchanged.

With respect to petitioner's request for expungement of Executive Branch records, the court of appeals' jurisdictional ruling was clearly correct. Federal courts are courts of limited jurisdiction and "possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." *Kokkonen*, 511 U.S. at 377 (citations omitted). Except in certain narrow areas, federal courts have no common-law power unrooted in a congressional grant of authority, see *Northwest Airlines, Inc.* v. *Transportation Workers Union*, 451 U.S. 77, 95-96 (1981), and cannot grant relief except to vindicate a right created by Congress, *Alexander* v. *Sandoval*, 532 U.S. 275, 286-287 (2001), or the Constitution, *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 392-394 (1971).

Absent a specific statutory provision authorizing or precluding judicial review, a contention that the Attorney General was maintaining or disseminating criminal records in violation of law would be cognizable under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.* (APA), in a suit brought by a person aggrieved by the alleged violation. The questions presented in such a suit, however, would be wholly unrelated to those involved in the underlying criminal case and would therefore lie outside the ancillary jurisdiction of the court in which the prosecution was brought. See *United States* v. *Janik*, 10 F.3d 470, 471 (7th Cir. 1993) (explaining that 18 U.S.C. 3231, which vests the district courts with jurisdiction over federal criminal offenses, "does not vest federal district courts with authority to invade the Executive Branch of government, in particular the Attorney General").[1] And even in an APA suit, the district court would have no general equitable authority to order expungement of Executive Branch records maintained in accordance with applicable statutes, particularly in light of Congress's "clear mandate that the Attorney General preserve all criminal records." *Geary* v. *United States*, 901 F.2d 679, 680 (8th Cir. 1990).

Thus, in limiting the question presented to expungement of "*judicial* criminal records," Pet. i (emphasis added), petitioner has fundamentally altered the nature of the request that was submitted to the courts below. Because the potential harms identified by petitioner were alleged to have resulted from the Attorney Gen-

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[1] In the court of appeals, petitioner contended, without meaningful elaboration, that the Attorney General's dissemination of records concerning his criminal prosecution "exceed[ed] [the] scope of 28 U.S.C. § 534." Pet. App. 19a. Petitioner does not press that claim in this Court.

eral's maintenance and dissemination of the relevant records, petitioner would have no colorable equitable claim to expungement of records in the custody of the Judicial Branch, even if the court that heard the prior criminal case had jurisdiction to entertain that request. The instant case would therefore be an unsuitable vehicle for resolution of the question presented, even if that question otherwise warranted this Court's review.

2. Petitioner contends (Pet. 8-10) that this Court's review is warranted because five courts of appeals have held that district courts possess equitable authority to order expungement of judicial records pertaining to prior criminal prosecutions. As the court of appeals in the instant case explained, however, the decisions on which petitioner relies "either predate *Kokkonen* or they fail to address that decision, which raises questions as to their continued viability." Pet. App. 8a. Of the cases on which petitioner relies to establish a circuit conflict, only *United States* v. *Flowers*, 389 F.3d 737 (7th Cir. 2004), was decided after *Kokkonen*. The court's jurisdictional ruling in *Flowers* was based entirely on pre-*Kokkonen* circuit precedent, see *id.* at 739, and the court did not cite *Kokkonen*.[2] By contrast, the four other circuits that have addressed the question since *Kokkonen* have all relied on *Kokkonen* to hold that a district court lacks ancillary jurisdiction to expunge records in a criminal case on purely equitable grounds. See Pet. App. 8a-9a; *Meyer*, 439 F.3d at 859-860; *Dunegan*, 251 F.3d at 479; *Sumner*, 226 F.3d at 1014. The clear trend in the circuits since this Court's decision

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[2] The Seventh Circuit in *Flowers* also reaffirmed its prior holding in *Janik* that federal courts do *not* possess jurisdiction to order expungement of *Executive Branch* records. See 389 F.3d at 738; p. 7, *supra*.

in *Kokkonen* counsels against further review in this case.

3. Further review of the jurisdictional question petitioner presents is also unwarranted because his claim fails on the merits. Petitioner identifies no court of appeals decision *granting* expungement of judicial records under circumstances similar to those presented here. As the district court explained, petitioner failed to show either that his indictment was unlawfully obtained or that he would suffer "extreme hardship" if his record was not expunged. See Pet. App. 34a. In the court of appeals, petitioner noted but did not challenge the district court's finding that the grand jury proceedings were lawfully conducted. See *id.* at 21a-22a. He contended, however, that he would suffer "unusual or extreme hardship" if his record was not expunged because the crimes with which he had been charged (bribery and conspiracy to commit bribery) "raise suspicion as to the character and credibility of the accused," and because his profession as an attorney made it particularly important that he maintain a reputation for trustworthiness. *Id.* at 22a, 23a.[3]

Petitioner cites no decision holding that the prospect of adverse employment consequences constitutes "extreme hardship" warranting expungement of judicial records. The Seventh Circuit in *Flowers*—the only post-

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[3] In both the district court and the court of appeals, petitioner referred without elaboration to the complaint of an unnamed grand juror that the government had been uncooperative with the grand jury and had withheld material information. See Pet. App. 18a, 64a. In his court of appeals brief, however, petitioner did not challenge the district court's determination that no illegality in the grand jury proceedings had been shown. Rather, he based his claim for expungement solely on an assertion of "unusual or extreme hardship." See *id.* at 21a-23a.

Kokkonen court of appeals decision that has adopted petitioner's position on the jurisdictional question—squarely held that impairment of employment prospects is *not* a valid ground for expungement. See 389 F.3d at 739-740. Petitioner's status as an attorney does not alter that analysis. To the extent that potential clients prefer not to retain a lawyer who has been indicted and later acquitted on bribery charges, expungement of the relevant records would hinder the clients' ability to make a choice that is theirs to make. And in any event, petitioner has identified no basis for concluding that expungement of Judicial Branch records alone would redress the alleged injury to his professional reputation. See pp. 5-8, *supra*.

Moreover, at least when a request for expungement is premised on harms occurring after the conclusion of the criminal proceedings, rather than on an asserted legal infirmity in the prosecution itself, the court that heard the criminal case clearly lacks ancillary jurisdiction under the standards announced in *Kokkonen*. The exercise of ancillary jurisdiction may be appropriate "(1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent; and (2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees." *Kokkonen*, 511 U.S. at 379-380 (citations omitted); see Pet. App. 5a-6a. The first prong of that test is not satisfied here because issues concerning the existence or extent of current harm to petitioner's professional reputation and ability to attract business are unrelated to any question that was resolved in the underlying criminal prosecution. And because the court in the criminal case did not find the government's initiation or conduct of the prosecution to

be unlawful, expungement of judicial records would not further the court's ability "to manage its proceedings, vindicate its authority, and effectuate its decrees." *Kokkonen*, 511 U.S. at 380.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

ARTIN H. COLOIAN,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The courts of appeals are split 5-4 on the question presented here—whether a federal court has the power to expunge its own records. The petition showed (at 8-16) that this split is not only deep, but also that it is an important and recurring one: There are more than fifty federal cases in the last ten years alone that have reached divergent answers on this threshold jurisdictional question.

The petition also showed (at 16-21) that, for twenty years before this Court decided *Kokkonen v. Guardian Life Insurance Co. of America*, 511 U.S. 375 (1994), federal courts had uniformly ruled that they had jurisdiction to expunge their own records of criminal proceedings. Since *Kokkonen*, several courts of appeals—including the First Circuit below—have ruled that federal courts do not have this power over their own records. But, as the petition showed, *Kokkonen* did not address the question presented here. It addressed only whether, in the absence of a clause preserving jurisdiction, a federal court has jurisdiction to enforce a settlement agreement merely because it had jurisdiction over the underlying case. It did not address jurisdiction to correct or expunge a court's own records or the ancillary jurisdiction of the federal courts in criminal matters. Thus, the court of appeals below, and the others that are in the minority of the split on the question presented here, have misapplied the principles set out in *Kokkonen* in support of an erroneous rule denying the federal courts' long-recognized jurisdiction over their own records of criminal proceedings.

The Government does not contest either the existence of this circuit split or the importance and recurring nature of the question presented by Mr. Coloian's petition. Nor does the Government mount any serious argument that the courts in the minority of the split have correctly applied *Kokkonen*.

Nonetheless, the Government contends that this Court's review is not warranted. Its primary argument (Opp. 5-8) is

that this case is "an unsuitable vehicle" for resolution of the question presented because, in its view, the petition has limited the question to authority to expunge *judicial* records whereas the proceedings below also involved a request to expunge records of the *executive branch*. That argument is based on a plainly incorrect characterization of the record. Petitioner's motion in the trial court sought expungement only of judicial records, as was recognized by all the parties to the trial court proceedings as well as by the court of appeals. This supposed vehicle problem simply does not exist.

The Government's other arguments—that the decision below is part of a recent "trend" in the law that does not warrant this Court's review, and that Mr. Coloian's claims fail on the merits—are equally unpersuasive. As the Government concedes, the trend in the law it cites is not uniform. And, as shown in the petition, the courts on the minority side of the split, including the court of appeals below, have misapplied this Court's decision in *Kokkonen*, a decision that, in all events, did not address the question presented here. The Government also cannot dispute that there is a 5-4 split on the question presented, and, because courts continue to disagree on this issue even after *Kokkonen*, there is no indication that the split will be resolved without this Court's intervention. Further, the Government's arguments about the merits of Mr. Coloian's claims fail to recognize that the question presented to this Court is not whether Mr. Coloian's motion to expunge should have been granted, but whether the courts below had the jurisdiction to even entertain it. Mr. Coloian has made a strong argument that the district court applied an erroneous legal standard to his claims for expungement, and the court of appeals should address that argument on the merits.

In short, the Government's opposition suggests no serious basis for denying review.

I. THE GOVERNMENT'S PRIMARY ARGUMENT THAT PETITIONER'S CLAIMS SEEK EXPUNGEMENT OF EXECUTIVE RECORDS IS PLAINLY INCORRECT

The Government's primary argument in opposition to certiorari is that this case is an "unsuitable vehicle" to resolve the question whether a federal court has jurisdiction to expunge its own records. Opp. 5-8. According to the Government, petitioner's request below was "not limited to records in the custody of the Judicial Branch" and the underlying harms at issue differ depending on whether a court is asked to expunge judicial records or executive records. As an initial matter, the Government acknowledges that Mr. Coloian is seeking to expunge judicial records and so there is no question that, as to that request, there is a clear issue regarding whether the district court had jurisdiction to expunge its records of Mr. Coloian's case. More significantly, the Government's principal argument in opposition is also based on a plain mischaracterization of the record in this case.

Mr. Coloian's motion was to expunge "his record in the above case." Pet. App. 59a. And, indeed, in the district court, all parties and the court recognized that Mr. Coloian's motion applied to only judicial records. The Government stated that it understood Mr. Coloian's motion to expunge his "record in the above entitled matter" to relate to "*all judicial records* connected to the case, including the indictment, pleadings, exhibits, and transcripts of public court proceedings." Pet. App. 68a & n.1 (emphasis added). The Government's counsel confirmed at oral argument, "I'm presuming that we're here on the judicial records kept by this Court." Pet. App. 30a. And counsel further characterized Mr. Coloian's request as one to "destroy your [the district court's] records and send them down the memory hole." Pet. App. 32a. Likewise, in his brief remarks at oral argument Mr. Coloian's counsel indicated that he was seeking expungement of judicial records, for example, by relying on

the Seventh Circuit's decision in *United States v. Flowers*, 389 F.3d 737, 738 (7th Cir. 2004), for the proposition that "in order to preserve *judicial records* for the purpose of sentencing and sentencing guidelines, there's a need to control those records and have them present when someone is to be sentenced." Pet. App. 29a (emphasis added).

The district court plainly understood that Mr. Coloian's motion sought to expunge only his judicial records. The court never ruled or even suggested that it had jurisdiction to expunge records kept by the Executive Branch or that there was any reason to reach that issue. Indeed, when it framed the issue posed by Mr. Coloian's motion, the district court noted that there appeared to be an unresolved question as to whether a federal district court has jurisdiction to expunge its own records. *See* Pet. App. 32a ("There is nothing that I'm aware of or that counsel have called to my attention that either expressly authorizes or prohibits a court from expunging the records of proceedings before it."). The court then ruled that federal courts do have jurisdiction to expunge judicial records, reasoning "that courts do have inherent authority and inherent control over *their records* and can, in appropriate circumstances, expunge records." Pet. App. 32a-33a (emphasis added).

On appeal, the First Circuit also understood the issue before it as whether a federal district court has jurisdiction to expunge judicial records. The First Circuit recounted and then reviewed the district court's ruling that it had jurisdiction over its own records. Pet. App. 3a ("[T]he district court first concluded that 'courts do have inherent authority and inherent control over *their* records and can, in appropriate circumstances, expunge records, but that power should be sparingly exercised.'") (emphasis added). And, in discussing the circuit split on this issue, the Court included the Seventh Circuit among those courts of appeals that have "concluded that district courts do have ancillary jurisdiction to expunge records based on equitable considerations," Pet. App. 8a, without noting that the Seventh Circuit has

distinguished between a court's jurisdiction to expunge executive records and judicial records and has held that a federal court has jurisdiction to expunge only judicial records. *See Flowers*, 389 F.3d at 738 ("[W]e have previously made clear that federal courts lack jurisdiction to order expungement of such records [maintained by the executive branch].").

The Government, too, noted in its appellate brief that the Seventh Circuit's decision in *Flowers* had "expressly found ancillary jurisdiction or inherent authority to order expungement based on equitable considerations," without then noting the Seventh Circuit's distinction between judicial and executive records. Pet. App. 49a. In its briefing to the First Circuit, the Government expressed confusion, for the first time by any party, as to whether Mr. Coloian's application reached executive records. Pet. App. 51a.

The Government's misunderstanding apparently stems from Mr. Coloian's counsel's discussion at oral argument before the district court of 28 U.S.C. § 534, which provides the Attorney General with authority to collect and disseminate criminal records. *See* Opp. 6; Pet. App. 27a (colloquy at oral argument concerning this statute). But, in that exchange, Mr. Coloian's counsel was not asking the court to expunge records in the Attorney General's possession. Rather, counsel argued that if Mr. Coloian's judicial records were not expunged, *those* records would ultimately be disseminated by the Attorney General to Mr. Coloian's detriment. *See* Pet. App. 27a.

Indeed, there would be no need for Mr. Coloian to invoke the ancillary jurisdiction or inherent powers of the Court to seek to correct records in the Attorney General's possession. As the Government points out (Opp. 7), under the Administrative Procedure Act there is a private right of action to correct inaccurate executive branch records. *See, e.g., Tarlton v. Saxbe*, 507 F.2d 1116, 1134 n.5 (D.C. Cir. 1974). Mr. Coloian's motion sought to correct only his

judicial records. If that motion were granted, and if the Executive Branch did not fulfill its obligation to correct the records in its possession, Mr. Coloian plainly would have a statutory remedy to seek such correction.

The Government has thus manufactured a completely illusory vehicle problem in this case. The Government's counsel in the district court, Mr. Coloian, the district court, and the First Circuit all understood Mr. Coloian's motion to request expungement only of the district court's own records of Mr. Coloian's criminal proceedings. The question whether a district court has jurisdiction to expunge its own records is squarely presented here.

II. THE GOVERNMENT DOES NOT DENY THAT THERE IS A 5-4 CIRCUIT SPLIT AS TO THE IMPORTANT AND RECURRING JURISDICTIONAL QUESTION WHETHER A FEDERAL COURT HAS THE POWER TO EXPUNGE ITS OWN RECORDS

The Government does not contest that there is a 5-4 circuit split on the question presented. Nor does the Government contest that the question presented is an important and recurring one which, as Mr. Coloian set forth in his petition, has been raised and decided in a non-uniform manner by more than fifty reported decisions in the federal courts during the past ten years. Pet. 13 & n.2. The Government also acknowledges that the decision below conflicts with a recent decision by the Seventh Circuit holding that a federal court *does* have jurisdiction to expunge judicial records. Opp. 8.

The Government's sole argument (Opp. 8-9) as to why this deep circuit split, on an important and recurring issue, does not warrant review by this Court is that there is a "trend in the circuits" since this Court's decision in *Kokkonen* to rule that federal courts do not have jurisdiction to expunge their own records. The Court's decision in *Kokkonen*, however, did not purport to address the application of

ancillary jurisdiction over a court's own records. Nor did the Court sweep any broader than answering the question before it in that case: whether a district court has "inherent power" to enforce a settlement agreement merely because it had jurisdiction over the underlying case. The Court did invoke general principles of ancillary jurisdiction, but noted in doing so that "[t]he doctrine of ancillary jurisdiction can hardly be criticized for being overly rigid or precise." 511 U.S. at 379.

While *Kokkonen* answered the question presented in that case, the courts have continued to note outside that context that the doctrine of ancillary jurisdiction is "not easily defined" and "not well settled" and, indeed, that it is not even clear whether it should apply at all in the context of a criminal proceeding. *Stein v. KPMG, LLP*, 486 F.3d 753, 760 (2d Cir. 2007); *Garcia v. Teitler*, 443 F.3d 202, 208 (2d Cir. 2006) ("The boundaries of ancillary jurisdiction are not easily defined and the cases addressing it are hardly a model of clarity."). The Government notes that the Seventh Circuit's jurisdictional holding in *Flowers* was based on "pre-*Kokkonen* circuit precedent" (Opp. 8), but the other courts of appeals on the Seventh Circuit's side of the split each have their own "pre-*Kokkonen* circuit precedent." Indeed, before the Court decided *Kokkonen*, the circuits uniformly held that federal courts had jurisdiction to entertain applications to expunge judicial records. Pet. 8-10. And, if anything, the principles of ancillary jurisdiction set forth in *Kokkonen* favor a jurisdictional rule that is directly contrary to the one followed in the "trend" of cases in the circuits applying *Kokkonen* to motions to expunge judicial records. Pet. 16-21.

In light of the uncertainty surrounding the application of the doctrine of ancillary jurisdiction outside well-established contexts such as contempt proceedings, petitions for attorneys' fees, and, since *Kokkonen*, settlement agreements, the split on the question presented here is not likely to be resolved unless this Court intervenes. The Court should answer the question presented by this deep circuit split and

resolve the confusion in the courts of appeals surrounding the question presented in this case.

III. THE GOVERNMENT'S ARGUMENTS ABOUT THE MERITS OF MR. COLOIAN'S CLAIMS ARE UNPERSUASIVE

Finally, the Government does not adequately respond to the petition's showing (at 16-21) that the court below misapplied *Kokkonen* in holding that federal courts lack jurisdiction to expunge their own records. Instead, the Government focuses (Opp. 9-11) on the *merits* of Mr. Coloian's request for expungement.

The Government's focus is misplaced. To begin with, the Government's presentation on the merits of Mr. Coloian's claims for expungement fails to recognize that he has set forth a strong argument that the court of appeals applied an erroneous legal rule on the threshold *jurisdictional* question squarely presented by this petition. That is the question the Court would address if it grants the petition, not the fact-bound issues raised by the Government as to whether Mr. Coloian has suffered adequate hardship, harm to his reputation, adverse employment consequences, or any other harm that the courts below may consider in determining whether to expunge judicial records if, as a threshold matter, this Court holds that a federal court has the power to expunge its own records.

In any event, as Mr. Coloian showed below, the district court applied an unduly restrictive legal standard to his claim for expungement. Mr. Coloian was *acquitted* of the charges brought by the Government. His situation is thus unlike many claimants who seek expungement on the basis of equitable factors such as good behavior after criminal convictions. The district court nevertheless disregarded the unfair stigma that has attached to Mr. Coloian, and that will impede his career as a lawyer, as a result of the politically motivated charges brought against him by the Government. Instead, as Mr. Coloian argued below in the court of appeals,

the district court wrongly applied a standard on the merits of Mr. Coloian's expungement claim that emerged from cases addressing expungement in the context of requests by convicted criminals. *Compare* Pet. App. 33a-34a, *with id.* at 17a-18a (arguing that "[t]he hardship alleged by Mr. Coloian is the stigma that attached to him and it[]s interference with his law practice and business," from having been indicted for a "crime of dishonesty" based on ultimately incredible testimony in a politically charged prosecution). Other cases involving criminal defendants who have been acquitted have included an expungement remedy in similarly extraordinary circumstances. *See, e.g.*, *Diamond v. United States*, 649 F.2d 496, 496-99 (7th Cir. 1981); *United States v. Johnson*, 714 F. Supp. 522, 524-25 (M.D. Fla. 1989); *United States v. Kalish*, 271 F. Supp. 968, 970 (D.P.R. 1967) *cf. Doe v. Immigration & Customs Enforcement*, No. M-54, 2004 WL 1469464 (S.D.N.Y. June 29, 2004), *reconsideration granted on other grounds*, 2006 WL 1294440 (S.D.N.Y. May 10, 2006). The court of appeals never addressed the merits of Mr. Coloian's claims, however, because, on the question presented by this petition, the court held that it lacked the power to reach the merits.

This threshold jurisdictional question of whether a court even has the power to grant a motion for expungement—not whether Mr. Coloian's particular motion should have been granted—is what is now presented for this Court's review. The Government conflates the merits of Mr. Coloian's particular claims with a court's jurisdiction to hear them. It makes a conclusory argument that, under *Kokkonen*, the first and second "heads" of ancillary jurisdiction have not been met here because (i) issues concerning Mr. Coloian's reputation are not sufficiently "factually interdependent" with his underlying criminal case, and (ii) the district court did not "find the government's initiation or conduct of the prosecution to be unlawful." Opp. 10-11. But a district court either has jurisdiction over a motion to expunge judicial records or it does not. The jurisdictional inquiry

should not turn on whether, as the Government frames the issue, the motion for expungement should be granted in the particular case at hand.

The proper way to frame the jurisdictional inquiry under the framework set out in *Kokkonen* is not whether all of the facts and circumstances of *Mr. Coloian's* request for expungement are inextricably intertwined with his underlying case, but whether, as a more generally applicable rule, a motion to expunge judicial records of criminal proceedings is sufficiently interrelated to the underlying proceeding. Similarly, the jurisdictional question under the second "head" of ancillary jurisdiction identified in *Kokkonen* should be whether a court should have the power to manage its own records to "enable [it] to function successfully," *Kokkonen*, 511 U.S. at 380—which it plainly should—not whether in any particular case the prosecutor has acted unlawfully and the court should therefore expunge its records, as the Government suggests. In all events, as the petition showed (at 18-21) without meaningful response from the Government, Mr. Coloian's claims for expungement are in fact intertwined with his underlying criminal proceedings since they are based, in part, upon the profound irregularities that marked those proceedings, and thus it is plain that the court here requires the power to expunge as a possible remedy for the harm that Mr. Coloian has suffered.

This Court's immediate review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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